TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 804.

CHARLES MASON AND A. HANSON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

FILED AUGUST 7, 1915.

(25,434)

(25,434)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 604.

CHARLES MASON AND A. HANSON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 30, 1917.

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1 *Attorneys of Record.*

F. M. Saxton, U. S. District Attorney, Nome, Alaska, Attorney for Plaintiff.

Geo. B. Grigsby, Nome, Alaska; Hugh O'Neill, Nome, Alaska, Attorneys for Defendants.

2 In the District Court for the District of Alaska, Second Division.

UNITED STATES, Plaintiff,

vs.

CHAS. MASON and A. HANSON, Defendants.

Affidavit for Contempt.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Frank P. Williams, being first duly sworn, deposes and says that heretofore on the 4th day of April, 1916, the grand jury of the District Court for the District of Alaska, Second Division, duly empaneled and sworn, made and presented to the Judge of above entitled Court the following report, to-wit:

"To the Hon. J. R. Tucker, Judge of the District Court, Second Division, District of Alaska:

We, your grand jury duly empaneled and sworn for the Regular term of the District Court of the District of Alaska, Second Division, beginning Jan. 29, 1916, beg to report that in investigating the charge of gambling against Ed. Johnson, A. C. Laird, Frank Koibetitz, John *John* Novosel, Nick Skorlich, Alfred Pierson, and Adelbert G. Gumaer, the witness, Chas. Mason was duly sworn and testified that he was present, sitting at a table in the Arctic Billiard Parlor in Nome at the time the above named parties were arrested upon said charge of gambling but refused to answer the following questions:

"Was there a game of cards being played on this particular evening at the table at which you were sitting?"

"Was there a game of cards being played at another table at this time?"

And we further report that the witness, A. Hanson, was duly sworn and testified that he was present, sitting at a table in the said Arctic Billard Parlor at the aforesaid time but refused to answer the following questions:

"If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing "stud poker" or "pangingi?"

"If at this same time you saw any one playing a game of cards at the table at which you were sitting?"

3 We ask your Honor to advise us whether or not said witnesses should answer said questions and if so that you make an order directing said witnesses to answer same.

Respectfully submitted,

FRANK P. WILLIAMS,
Foreman."

That thereafter on said 4th day of April, 1916, said report was duly considered by said Court, the above named defendants being present in person and by their attorney, Geo. B. Grigsby, and the Court having heard the same, ordered and directed each of the said defendants to answer each and all of the above questions shown by said report to have been propounded to each of said defendants before said grand jury, a copy of which order is hereto attached, marked "Exhibit A," and made a part hereof, on said 4th day of April, 1916, said grand jury being in regular session, the said defendant, Chas. Mason, was called before said grand jury and said questions set out in said report as having been propounded to said Chas. Mason, were again propounded to said Chas. Mason and he then and there refused to answer the first one of said questions set out in said report. And thereafter on the said 4th day of April, 1916, said defendant, A. Hanson, was called before said grand jury, then and there in regular session, and said questions set out in said report as having been propounded to said A. Hanson, were again propounded to said A. Hanson, and he, the said A. Hanson, then and there refused to answer each and all of said questions.

That by reason of the acts aforesaid the defendants became and are guilty of contempt of this court.

Wherefore affiant prays that a bench warrant may issue for the arrest of said defendants, and that a hearing may be had to determine the truth of the facts herein alleged and the said defendants punished for contempt.

FRANK P. WILLIAMS.

Subscribed and sworn to before me this 5th day of April, 1916.
(Court Seal.)

W. C. McGUIRE,
Deputy Clerk of the District Court.

4 In the District Court for the District of Alaska, Second Division.

In the Matter of the Report of the Grand July in Reference to CHAS. MASON and A. HANSON.

Order.

Now, on this 4th day of April, 1916, the grand jury having filed a report showing that the above named Chas. Mason had appeared

before them in regular session on said 4th day of April, 1916, and that the following questions had then and there been propounded to him, which he, the said Chas. Mason had then and there refused to answer, to-wit:

"Was there a game of cards being played on this particular evening at the table at which you were sitting?"

"Was there a game of cards being played at another table at this time?"

And said report further showing that the above named A. Hanson had appeared before said grand jury in regular session on the 4th day of April, 1916, and that the following questions had then and there been propounded to him, which he, the said A. Hanson, had then and there refused to answer to-wit:

"If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing "stud poker" or "pangingi?"

"If at this same time you saw any one playing a game of cards at the table at which you were sitting?"

And the said report of said grand jury coming on for consideration, and the said Chas. Mason and A. Hanson appearing in open court in person and by their attorney, Geo. B. Grigsby, and the Court having heard the arguments of counsel, and being fully advised in the premises, finds that each and all of said questions are proper and that the answers thereto would not tend to incriminate the witnesses.

It is therefore ordered and adjudged that the said Chas. Mason appear before the said grand jury and answer the said questions, to-wit:

"Was there a game of cards being played; on this particular evening at the table at which you were sitting?"

"Was there a game of cards being played at another table at this time?"

And it is further ordered and adjudged that the said A. Hanson appear before said grand jury and answer the said questions, to-wit:

"If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing "stud poker" or "panging-?"

"If at this same time you saw any one playing a game of cards at the table at which you were sitting?"

Dated this 4th day of April, 1916.

J. R. TUCKER,
District Judge.

Endorsed: #1034. Crim. The District Court, District of Alaska, Second Division. The United States vs. Chas. Mason and A. Hanson. Affidavit for Contempt. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 5, 1916, G. A. Adams, Clerk, By —— ——, Deputy.

6 In the District Court for the District of Alaska, Second Division.

Term Minutes.

General 1916, Term, Beginning January 29, 1916.

WEDNESDAY, April 5, 1916—at 10 A. M.

Court convened pursuant to adjournment.
Honorable J. R. Tucker, District Judge, presiding.
Upon the convening of Court the following proceedings were had:

1034. C.

UNITED STATES

vs.

CHAS. MASON and A. HANSON.

G. B. Grigsby, counsel for defendants, present. United States represented by F. M. Saxton, District Attorney.
Order made setting time for hearing 9 A. M. tomorrow.
Order made authorizing issuance of bench warrant for arrest of defendants.

7 In the District Court for the District of Alaska, Second Division.

No. —.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHAS. MASON and A. HANSON, Defendants.

Demurrer.

Come now the defendants in the above entitled action and demur to the affidavit for contempt filed herein on the following grounds:

I.

That said affidavit for contempt does not substantially conform to the requirements of Chapter 7 of Title XV of the Compiled Laws of Alaska.

II.

That more than one crime is charged in said affidavit for contempt.

GEORGE B. GRIGSBY,
HUGH O'NEILL,
Attorneys for Defendants.

Endorsed: #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America, Plaintiff, vs. Chas. Mason and A. Hanson, Defendants. Demurrer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 6, 1916. G. A. Adams, Clerk, By —— ——, Deputy. F. W. L.

8 In the District Court for the District of Alaska, Second Division.

No. —.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHAS. MASON and A. HANSON, Defendants.

Demurrer.

Come now the defendants in the above entitled cause and demur to the affidavit of contempt on file herein and for ground of demurrer allege:

I.

That the said affidavit for contempt does not state facts sufficient to constitute a cause of action.

Defendants demur specially to said affidavit for contempt.

Defendants demur specially to said affidavit for contempt.

I.

That said affidavit contains no order attached thereto marked "Exhibit A" which said order purports to be a part of said affidavit.

II.

That that certain order heretofore entered in the matter of the report of the Grand Jury in reference to Charles Mason and A. Hanson dated the 4th day of April, 1916, is void on the ground that the Court had no jurisdiction to enter it.

Respectfully submitted,

GEO. B. GRIGSBY,
HUGH O'NEILL,
Attorneys for Defendants.

Endorsed: #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Demurrer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Apr. 6, 1916. G. A. Adams, By —— ——, Deputy.

9 In the District Court for the District of Alaska, Second Division.

Term Minutes.

General 1916 Term, Beginning January 29, 1916.

THURSDAY, April 6, 1916—at 9 A. M.

Court convened pursuant to adjournment.

Honorable J. R. Tucker, District Judge, presiding.

Upon the convening of court the following proceedings were had:

1034. C.

UNITED STATES

vs.

CHAS. MASON and A. HANSON.

Geo. B. Grigsby on behalf of defendants filed demurrer.

Demurrer argued by Geo. B. Grigsby and Hugh O'Neill on behalf of defendants, with counter argument by District Attorney, F. M. Saxton.

At 10:15 A. M. a continuance taken until 1 P. M.

1034. C.

UNITED STATES

vs.

CHAS. MASON and A. HANSON.

1 P. M.

Further argument behalf of demurrer submitted by Geo. B. Grigsby and Hugh O'Neill.

Supplemental demurrer of defendants filed.

At 1:30 P. M. recess taken until 1:45 P. M.

1.45 P. M.

Demurrer of defendants overruled, defendants taking and being allowed an exception to the ruling.

Whereupon defendants, through counsel Geo. B. Grigsby, entered a plea of not guilty.

Trial commenced.

G. A. Adams sworn and testified behalf of plaintiff.

Report of Grand Jury, as to refusal of Chas. Mason and A. Hanson to answer certain questions propounded, filed in the office of the

Clerk April 4, 1916, offered and admitted in evidence and ordered marked "Plaintiff's Exhibit A."

Order of the District Court made April 4, 1916, in proceedings entitled "In the Matter of the report of the Grand Jury in reference to Chas. Mason and A. Hanson," and filed in the office of the Clerk April 4, 1916, offered and admitted in evidence and ordered marked "Plaintiff's exhibit B."

Frank P. Williams and D. E. Crowley sworn and testified on behalf of plaintiff.

Plaintiff rests.

Defendants' case.

F. M. Saxton, Phil Holland, defendants Chas. Mason and A. Hanson each sworn and testified.

Geo. B. Grigsby, counsel for defendants, asked that the Judge of the Court be sworn as a witness, which request was denied.

Defendants rest.

Taking of evidence closed.

Counsel for respective parties submitted arguments to the Court. Judgment rendered that defendants, Chas. Mason and A. Hanson, be convicted of contempt of Court as charged, and that they each be fined in the sum of $100.00, and that they each be imprisoned until they comply with the orders of the Court by answering the questions.

Geo. B. Grigsby moved for stay of proceedings.

Order made staying the proceedings in reference to the $100.00 fine of said defendants and fixing supersedeas bond at the sum of $500.00, but denying a stay in reference to the imprisonment of the defendants.

Order made remanding the defendants into the custody of the U. S. Marshal to carry the sentence into effect.

1034. C.

UNITED STATES
vs.
CHAS. MASON and A. HANSON.

4 P. M.

Defendants, with counsel Geo. B. Grigsby and Hugh O'Neill, present.

United States Represented by F. M. Saxton, District Attorney.

It being made to appear that defendants had complied with the orders of the Court relative to answering questions before the Grand Jury, an order was made directing their discharge from custody, and on motion of Geo. B. Grigsby a stay of proceedings in reference to the fines imposed for a period of five days was granted.

11 In the District Court for the District of Alaska, Second Division.

UNITED STATES, Plaintiff,
vs.
CHAS. MASON and A. HANSON, Defendants.

Determination and Sentence.

Now, on this 6th day of April, 1916, this cause coming on for hearing in open court, the plaintiff appearing by F. M. Saxton, United States Attorney, and the defendants appearing in person and by Geo. B. Grigsby and Hugh O'Neill, their attorneys, and the Court having heard the evidence adduced by both plaintiff and the defendants, and having heard the arguments of counsel, and being now fully advised in the premises finds the defendants, Chas. Mason and A. Hanson, guilty of the contempt charged.

It Is Therefore Considered, Ordered, and Adjudged that said defendants, and each thereof, be confined in the Federal Jail at Nome, Alaska, until such time as they, and each thereof, shall appear before the grand jury of this Division now in session and answer the questions propounded to each of them respectively as set forth in the "Affidavit for contempt" filed herein.

And It Is Further Considered, Ordered, and Adjudged that said defendant, Chas. Mason, be and he hereby is fined the sum of One Hundred Dollars, and that in default of the payment of such fine, or any part thereof, he be confined in the Federal Jail of Nome, Alaska, one day for each two dollars of such fine, not exceeding fifty days.

And It Is Further Considered, Ordered, and Adjudged that the defendant, A. Hanson, be and he hereby is fined the sum of One Hundred Dollars, and that in default of the payment of
12 said fine, or any part thereof, he be confined in the Federal Jail at Nome, Alaska, one day for each two dollars of said fine not exceeding fifty days.

And It Is Further Ordered that said defendants be remanded to the custody of the United States Marshal for the Second Division, District of Alaska, for the execution of this sentence.

Dated this 7th day of April, 1916.

J. R. TUCKER,
District Judge.

Endorsed: #1034 Crim. The District Court, District of Alaska, Second Division. The United States vs. Chas. Mason and A. Hanson. Determination and Sentence. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 7, 1916. G. A. Adams, Clerk, By —— ——, Deputy. Orders & Judgments, Vol. 11, page 223. C.

13 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHAS. MASON and A. HANSON, Defendants.

Opinion.

This case comes before this court upon an affidavit for contempt made by Frank P. Williams, foreman of the grand jury duly empaneled and sworn for the regular term of this court beginning Jan. 29, 1916, which, in investigating a charge of gambling against certain persons, called as witnesses the above named defendants, who, being duly sworn, testified that they were sitting at a table at the time and place at which the parties then being investigated were arrested upon said charge of gambling, but the witness Mason being asked the following questions, viz: "Was there a game of cards being played on this particular evening? Was there a game of cards being played at another table at this time?" refused to answer the same; and the witness Hanson being asked the following questions, viz: "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw anyone there playing 'stud poker' or 'pangingi?' If at this same time you saw anyone playing a game of cards at the table at which you were sitting?", refused to answer the same, whereupon the grand jury presented to the judge of this court a report setting forth the foregoing facts and this court, the above named defendants being present in person and by their attorney, ordered and directed each of said defendants to answer the aforesaid questions to them respectively propounded; but the defendant Mason being then recalled before the grand jury, persisted in refusing to answer the first of said questions, and the defendant Hanson being recalled before the grand jury, persisted in refusing to answer either of said questions; all of which is set forth in said affidavit for contempt, to which said defendants have interposed a demurrer.

Counsel for defendants have argued this case elaborately and ably, and they have cited the two great leading cases on the ques-
14 tion before this court in support of their contention that the questions propounded by the grand jury to the defendants are incriminatory. The facts in those cases were not like those involved here, and we have to apply the law to these particular questions or the facts here. I cannot agree with counsel's view or interpretation of C. J. Marshall's language in the Burr case, nor with his view of the language of the Court in the Counselman case.

In Ex Parte Irvine, 74 Fed. 954, Judge Taft reviewed the language of Marshall, C. J., in the Burr case, and the decision of the Supreme Court in the Counselman case, and the following is his state-

ment of the rule of law in these cases, and it seems to me it states the rule correctly, viz: (p. 960.)

"The second question is whether the statement of the witness that his answer to the question would criminate him was conclusive, so that the court could not compel an answer thereto. The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime."

The foregoing is only in reply to the argument of counsel for defendants as to what is an incriminatory question, and who is to determine its character. But I overrule the demurrer on the ground that the matter as to whether or not the questions put to these witnesses or defendants are incriminatory cannot now be raised in this way. The validity of my order for the defendants to answer these questions can only be attacked by appeal, or, probably by habeas corpus proceedings, should the defendants be committed.

Nome, Alaska, April 6, 1916.

J. R. TUCKER,
District Judge.

15 Endorsed: #1034. Crim. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendant. Opinion. Filed in the Office of the Clerk of the District Court of Alaska, Second division, at Nome. Apr. 7, 1916. G. A. Adams, Clerk, By —— ——, Deputy.

16 In the District Court for the District of Alaska, Second Division.

Term Minutes.

General 1916 Term, Beginning January 29, 1916.

SATURDAY, April 15, 1916—at 11 A. M.

Court convened pursuant to adjournment.
Honorable J. R. Tucker, District Judge, presiding.
Upon the convening of Court the following proceedings were had:

* * * * * * *

1034. C.

UNITED STATES

vs.

CHAS. MASON AND A. HANSON.

F. M. Saxton, District Attorney, moved for bench warrant, which was resisted by Geo. B. Grigsby, counsel for defendants.
Whereupon Order made continuing the stay of proceedings in reference to filing bill of exceptions and taking appeal until 12 o'clock, noon, Monday, April 17, 1916.

* * * * * * *

17 In the District Court for the District of Alaska, Second Division.

Term Minutes.

General 1916 Term, Beginning January 29, 1916.

MONDAY, April 17, 1916—at 10 A. M.

Court convened pursuant to adjournment.
Honorable J. R. Tucker, District Judge, presiding.
Upon the convening of Court the following proceedings were had:

* * * * * * *

1034. C.

UNITED STATES

vs.

CHAS. MASON and A. HANSON.

Bill of exceptions settled, allowed, signed and filed.

* * * * * * *

18 In the District Court for the Territory of Alaska, Second Division.

No. —.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Bill of Exceptions.

Be it remembered that on the 6th day of April, 1916, at the regular January, 1916, term of the above entitled Court begun and held at the Town of Nome, in the Territory of Alaska, Second Division, the demurrer and supplementary demurrer of the said defendants coming on regularly to be heard, the United States appearing by F. M. Saxton and the defendants Charles Mason and A. Hanson appearing in person and by George B. Grigsby and Hugh O'Neill their attorneys, and the Court having heard argument for and against said demurrers, overruled said demurrers and rendered the following order:

"In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Opinion.

This case comes before this court upon an affidavit for contempt made by Frank P. Williams, foreman of the grand jury duly empaneled and sworn for the regular term of this court beginning Jan. 29, 1916, which, in investigating a charge of gambling against certain persons, called as witnesses the above named defendants, who being duly sworn, testified that they were sitting at a table
19 at the time and place at which the parties then being investigated were arrested upon said charge of gambling, but the witness Mason being asked the following questions, viz: "Was there a game of cards being played on this particular evening? Was there a game of cards being played at another table at this time?" refused to answer the same; and the witness Hanson being asked the following questions, viz: "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlor, if you saw anyone there playing 'stud poker' or 'pangingi'? If at this same time you say anyone playing a game of cards at the table at which you were sitting?" refused to answer the same, whereupon the grand

jury presented to the judge of this court a report setting forth the foregoing facts and this court, the above named defendants being present in person and by their attorney, ordered and directed each of said defendants to answer the aforesaid questions to them respectively propounded but the defendant Mason being then recalled before the grand jury, persisted in refusing to answer the first of said questions, and the defendant Hanson being recalled before the grand jury, persisted in refusing to answer either of said questions; all of which is set forth in said affidavit for contempt, to which said defendants have interposed a demurrer.

Counsel for defendants have argued this case elaborately and ably, and they have cited the two great leading cases on the question before the court in support of their contention that the questions propounded by the grand jury to the defendants are incriminatory. The facts in those cases were not like those involved here, and we have to apply the law to these particular questions or the facts here. I cannot agree with counsel's view or interpretation of C. J. Marshall's language in the Burr case, nor with his view of the language of the court in the Counselman case.

In Ex Parte Irvine, 74 Fed. 954, Judge Taft reviewed the
20 language of Marshall, C. J., in the Burr case, and the decision of the Supreme Court in the Counselman case, and the following is his statement of the rule of law in these cases, and it seems to me it states the rule correctly, viz: (p. 960).

"The second question is whether the statement of the witness that his answer to the question would criminate him was conclusive, so that the court could not compel an answer thereto. The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime."

The foregoing is only in reply to the argument of counsel for defendants as to what is an incriminatory question, and who is to determine its character. But I overrule the demurrer on the ground that the matter as to whether or not the questions put to these wit-

nesses or defendants are incriminatory cannot now be raised in this way. The validity of my order for the defendants to answer these questions can only be attacked by appeal, or, probably by habeas corpus proceedings, should the defendants be committed.

Nome, Alaska, April 6, 1916.

J. R. TUCKER,
District Judge."

to which ruling the defendants duly excepted and an exception was then and there allowed.

Whereupon each of the defendants entered a plea of not guilty.

21 Be it further remembered that on the 6th day of April, 1916, at the January, 1916, term of the above entitled court begun and held at Nome, in the Territory of Alaska, Second Division, the above entitled cause of the United States of America, plaintiff, versus Charles Mason and A. Hanson, defendants, coming on regularly for trial before the Honorable J. R. Tucker, Judge of said court, the United States appearing by F. M. Saxton and the defendants appearing by George B. Grigsby and Hugh O'Neill, their attorneys, the following proceedings were had and taken in said cause, to-wit:

G. A. ADAMS was then called as a witness on behalf of the plaintiff and testified as follows:

(By Mr. Saxton:)

Q. State your name?
A. G. A. Adams.
Q. And what official position do you hold?
A. Clerk of the District Court.
Q. You have in your custody the files and orders of this court and papers?
A. I have.
Q. Will you produce the report of the Grand Jury that was made two days ago in reference to these witnesses, these two witnesses Charles Mason and A. Hanson?

(Witness produces paper.)

Q. State whether or not this paper I now hand you is that report?
A. This is the report of the Grand Jury submitted and filed on April 4th, 1916.

Whereupon said paper was offered in evidence and marked "Plaintiff's Exhibit A", which paper is as follows:

PLAINTIFF'S EXHIBIT A.

"To the Hon. J. R. Tucker, Judge of the District Court, Second Division, District of Alaska:

We, your grand jury duly empaneled and sworn for the
22 Regular term of the District Court of the District of Alaska, Second Division, beginning Jan. 29, 1916, beg to report that in investigating the charge of gambling against Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson, and Adelbert G. Gumaer, the witness Chas. Mason was duly sworn and testified that he was present, sitting at a table in the Arctic Billiard Parlor in Nome at the time the above named parties were arrested upon said charge of gambling but refused to answer the following questions:

Was there a game of cards being played on this Particular evening at the table at which you were sitting?

Was there a game of cards being played at another table at this time?

And we further report that the witness A. Hanson was duly sworn and testified that he was present, sitting at a table in the said Arctic Billiard Parlor at the aforesaid time but refused to answer the following questions:

If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing stud poker or pangingi?

If at this same time you saw any one playing a game of cards at the table at which you were sitting?

We ask your Honor to advise us whether or not said witnesses should answer said questions and if so that you make an order directing said witnesses to answer same.

Respectfully submitted,

FRANK P. WILLIAMS, *Foreman.*

23 Mr. Grigsby: We object to it being offered as the report of the Grand Jury upon the ground that it does not purport upon its face to be the report. I will state the grounds of my objection. The objection as to the admissibility of the paper offered by the District Attorney purporting to be a report of the Grand Jury and which is to be marked Exhibit A, we object to its admission on the ground that it does not purport on its face to be a report of the Grand Jury and that the testimony of the witness to the effect that it is the report of the grand jury is incompetent; and on the further ground that the facts set forth in the affidavit for contempt did not constitute a contempt; that in this affidavit for contempt two separate charges of contempt are set forth against two different defendants, neither one being charged with the same offense as the other, and we object to any further evidence being offered in this case on the ground that two separate defendants are charged in this affidavit for contempt with two separate acts of contempt, not charged jointly with the same act but charged with separate acts.

The Court: Overrule the objection.

To which ruling the defendants then and there excepted and an exception was then and there allowed.

Mr. Saxton: I will read the paper.

Mr. Grigsby: We waive the reading.

Q. State whether or not you have the order that was entered upon the hearing of that report?

A. I have.

Q. Produce the paper.

(Witness hands paper to counsel.)

24 Q. State whether or not this paper that I now hand you is such order?

A. This is the original order.

Mr. Saxton: If the Court please, we now offer in evidence the order that was made upon the hearing of this Grand Jury report.

Order marked "Plaintiff's Exhibit B" a copy of which is as follows:

"PLAINTIFF'S EXHIBIT B."

In the District Court for the District of Alaska, Second Division.

In the Matter of the Report of the Grand Jury in Reference to CHAS. MASON and A. HANSON.

Order.

Now, on this 4th day of April, 1916, the grand jury having filed a report showing that the above named Chas. Mason had appeared before them in regular session on said 4th day of April, 1916, and that the following questions had then and there been propounded to him, which he, the said Chas. Mason had then and there refused to answer, to-wit:

"Was there a game of cards being played on this particular evening at the table at which you were sitting?"

"Was there a game of cards being played at another table at this time?"

And said report further showing that the above named A. Hanson had appeared before said grand jury in regular session on the 4th day of April, 1916, and that the following questions had then and there been propounded to him, which he, the said A. Hanson, had then and there refused to answer, to-wit:

25 "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing 'stud poker' or 'pangingi'?

"If at this said time you saw any one playing a game of cards at the table at which you were sitting?"

And the said report of said grand jury coming on for consideration,

and the said Chas. Mason and A. Hanson appearing in open court in person and by their attorney, Geo. B. Grigsby, and the court having heard the arguments of counsel, and being fully advised in the premises, finds that each and all of said questions are proper and that the answers thereto would not tend to incriminate the witnesses.

It is therefore ordered and adjudged that the said Chas. Mason appear before the said grand jury and answer the said questions, to-wit:

"Was there a game of cards being played on this particular evening at the table at which you were sitting?"

"Was there a game of cards being played at another table at this time?"

And it is further ordered and adjudged that the said A. Hanson appear before said grand jury and answer the said questions, to-wit:

"If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing 'stud poker' or 'pangingi'?"

"If at this same time you saw any one playing a game of cards at the table at which you were sitting?

Dated this 4th day of April, 1916.

J. R. TUCKER,
District Judge.

Mr. Grigsby: I would like to ask a question, if the Court please.

(By Mr. Grigsby:)

Q. When was this written order entered?

A. It bears the date.

26 Q. Was it before or after the Judge directed the defendants to go to the grand jury room and answer the questions that are involved in this case?

A. You mean the writing of this paper?

Q. Yes.

A. Presumably subsequent.

Q. It is dated the 4th of April. Do you know what hour it was entered?

A. I don't understand the question. I don't understand what you mean by "entered".

Q. Signed, filed.

A. No I do not.

Q. You were present the other day when the Judge directed the defendants Chas. Mason and H. Hanson to go to the grand jury room and answer certain questions?

A. I was.

Q. Which were the questions set forth in this affidavit for contempt?

A. I was present.

Q. And the questions were those set forth in this affidavit for contempt?

A. I haven't compared them.
Q. Well you have heard them read here?
A. Yes sir I have heard them read.
Q. Are they the same?
A. I believe them to be the same.
Q. And in response to the Judge's order they did go to the grand jury room did they not?
A. I could not say.
Q. Were you present in the court room when they went back there to that room? (Indicating).
27 A. I saw them go back there, yes sir.
Q. And it was sometime after that that this order was entered?
A. I don't understand what you mean by "entered".
Q. Filed, signed.
A. It was after that that the order was presented for filing, yes sir.

Mr. Grigsby: We object to its admissibility, if the Court please, on the ground that it was not executed until after the alleged refusal of the defendants to obey it.

The Court: Overrule the objection.

To which ruling the defendants then and there excepted and an exception was then and there allowed.

(By Mr. Saxton:)

Q. Were the defendants Chas. Mason and A. Hanson present in court when the court made that order and announced it from the bench?
A. They were present.

Whereupon FRANK P. WILLIAMS was called as a witness on behalf of the plaintiff and being duly sworn testified as follows:

(By Mr. Saxton:)

Q. Your name is Frank P. Williams?
A. Yes sir.
Q. And you are the foreman of the present grand jury?
A. I am.
Q. Were you present in the grand jury room and was the grand jury in session after the order of court was made on the 4th day of April, 1916, directing Chas. Mason and A. Hanson to answer certain questions propounded by the grand jury, when Mason and Hanson appeared in the grand jury room?
28 A. I was present when they were in session.
Q. They appeared separately, did they?
A. Yes sir.
Q. State whether or not at that time this question was asked Chas. Mason: "Was there a game of cards being played on this particular evening at the table at which you were sitting?"

Mr. Grigsby: Objected to as leading.

Mr. Saxton: I am asking whether that question was asked.

The Court: Overrule the objection.

To which ruling the defendants then and there excepted and an exception was then and there allowed.

A. It was asked.

Q. What was the answer of Chas. Mason?

A. "I refuse to answer".

Q. At that same time and place state whether or not this question was asked Chas. Mason: "Was there a game of cards being plated at another table at this time?" Was that question asked?

A. Yes sir.

Q. And what answer did Charles Mason make to that question?

A. "I don't know".

Q. State whether or not just subsequent to Charles Mason's appearance before the grand jury, following that, A. Hanson appeared?

A. He did.

Q. State whether or not upon his appearance before the grand jury, the grand jury being in session, he was asked this question "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw anyone there playing "stud poker" or "pangingi"?

29 A. That question was asked.

Q. What answer did A. Hanson make to that question?

A. "I refuse to answer."

Q. At the same time state whether or not this question was asked Mr. Hanson: "If at this time you saw any one playing a game of cards at the table at which you were sitting?" What was his answer to that question?

A. His answer was: "I refuse to answer."

Q. Did he make any further or different answers than you have given?

A. No, sir.

Q. Did Charles Mason make any further answer than you have given?

Cross-examination.

(By Mr. Grigsby:)

Q. When these questions were first propounded to these men, when they first refused to answer them, did they give their reasons?

A. You mean before they had received the order from the court?

Q. Yes.

A. They hesitated a little bit at first and then they said they would refuse on the ground that it might tend to incriminate themselves.

Q. Those were the same questions the court afterwards directed them to answer?

A. Yes, sir.

Q. That applies to all these questions set forth in this affidavit?

A. Yes sir.

The foregoing is all of the testimony of the said witness.

30 And thereupon D. E. CROWLEY, a witness produced on behalf of the prosecution, being duly sworn, testified as follows:

Direct examination,

(By Mr. Saxton:)

Q. What is your full name?
A. Daniel E. Crowley.
Q. Are you a member of the present grand jury?
A. I am.
Q. And you are one of the grand jurors, are you?
A. Yes sir.
Q. You were present in the grand jury room on the 4th of April, 1916, after the court made the order directing the witnesses Charles Mason and A. Hanson to answer certain questions?
A. I was.
Q. When they returned?
A. Yes sir.
Q. The grand jury was in session at that time?
A. Yes sir.
Q. Which one of them came in first?
A. Charles Mason, I believe.
Q. I will ask you to state whether or not at that time this question was asked him: "Was there a game of cards being played on this particular evening at the table at which you were sitting?" Was that question asked him on his return?
A. Yes sir.
Q. What was his answer?
A. "I refuse to answer."
Q. At the same time or immediately thereafter was this question asked Charles Mason: "Was there a game of cards being played at another table at this time?" Was that question asked him?
A. Yes sir that question was asked.
31 Q. What was his answer to that?
A. "I don't know."
Mr. Grigsby: You mean that you don't know it?
The Witness: No, that was his answer, "I don't know."
Q. Did Charles Mason make any other or further answer to either of these questions than you have given?
A. No sir.
Q. After Charles Mason was excused was A. Hanson called into the room?
A. Yes sir.
Q. He appeared before the grand jury at that time?
A. Yes sir.
Q. State whether or not this question was asked Mr. A. Hanson at that time before the grand jury in regular session "if at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw anyone there playing "stud poker" or "pangingi?" Was that question asked him?
A. Yes sir.
Q. What was his answer?

A. "I refuse to answer."
Q. That was what he said?
A. That is what he answered, yes sir.
Q. And at the same time was this question asked him: "If at this same time you saw any one playing a game of cards at the table at which you were sitting?" Was that question asked him?
A. That question was asked him.
Q. What was his answer?
A. He answered "I refuse to answer."
Q. Did he make any further or different answers to either of these questions?
A. No sir.

32 Cross-examination.

(By Mr. Grigsby:)

Q. Mr. Crowley, did these witnesses state their reason for refusing to answer these questions?
A. Not the last time that the questions were asked.
Q. Well, before they were directed to answer the question by the Judge did they give their reason?
A. Yes sir.
Q. What was the reason they gave?
A. Why they said they refused to answer on the ground that it might tend to incriminate them.
Q. And when they were asked the questions again after the Judge directed them to answer, did you understand they were refusing on the same ground?

Mr. Saxton: Objected to as immaterial.
The Court: I don't think the question is material.

Q. Did anybody ask them to give their reason the second time?
A. No sir.
Q. Or did the District Attorney ask them to give their reason?
A. No sir.
Q. Did either one of them say they refused to answer for the same reason as before?
A. I don't think so.
Q. Would you be positive about that?
A. No, I would not.

The foregoing is all of the testimony of the said witness.

Whereupon counsel for the United States announced to the Court that the United States rested.
Whereupon the defendants introduced the following testimony:

Mr. Grigsby: I will have to call the Court as a witness, I call Judge TUCKER.
The Court: Mr. District Attorney, you will have to defend the Court.

Mr. Saxton: I don't think it is proper to call the Court in
33 this case. The Court's actions are a matter of record in this case.

Mr. Grigsby: That depends upon the questions I ask him. I have a right to call the court in any case, if the Court please. The Court is a competent witness. I don't call the Court, I call the Judge and ask that he be sworn.

Mr. Saxton: I object to such a proceeding.

The Court: I sustain the objection.

To which ruling the defendants then and there excepted and an exception was then and there allowed.

Whereupon Mr. SAXTON was called as a witness on behalf of the defendants and on oath testified as follows:

(By Mr. Grigsby:)

Q. I hand the witness Exhibit B purporting to be an order of the Court directing the defendants Charles Mason and A. Hanson to go before the grand jury and answer certain questions. Did you prepare that question, Mr. Saxton?

A. I did.

Q. When did you prepare it?

A. If I remember correctlt I prepared it the following morning.

Q. The day after Mr. Hanson and Mr. Mason refused to answer the questions?

A. Yes sir the morning following. It is usual for the District Attorney to prepare orders and proceedings for the Judge and prepare them for the court as soon as he can and has time to do so.

Q. This is dated, Mr. Saxton, April 4th, 1916, and. dated and signed on the next day by the Judge, signed the 5th of April.

A. I think it was, it was dated and signed of course of the time the order was made.

Q. At the time this order was made?

A. At the time that the actual order was made by the Court. I say it is dated and signed as of that time.

34 Mr. O'Neill: Did you ask that a nunc pro tunc order be entered?

Mr. Saxton: No I did not. This is not a nunc pro tunc order, if you will look at the dictionary and see.

Mr. O'Neill: Did you ask that a nunc pro tunc order be entered when they signed this order?

A. No sir. The Court made the order the evening before and all that was necessary was to make the written order conform with his oral order at the time he made the order. It isn't a nunc pro tunc order in any sense becuase the Court actually made the order and the writing was made as soon as the opportunity presented itself.

The foregoing is all of the testimony of the said witness.

Whereupon PHIL HOLLAND was called as a witness for the defendants and being duly sworn testified as follows:

(By Mr. Grigsby:)

Q. You are a deputy marshal, Mr. Holland?

A. Yes sir.

Q. Your name is Phil Holland?
A. Yes sir.
Q. Did you, during the past winter, cause the arrest of Ed Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson, Adelbert Gumaer, Charles Mason and A. Hanson and a man named Nelson on a charge of gambling?

Mr. Saxton: If the Court please, we object to that, it has nothing to do with this case and is immaterial.
The Court: Overrule the objection.

A. Yes, sir.

The foregoing is all of the testimony of the said witness.

35 Whereupon CHARLES MASON, on- — the defendants, was called on behalf of the defendants and being duly sworn testified as follows:

(By Mr. Grigsby:)

Q. Mr. Mason, you are one of the defendants in this action?
A. I am.
Q. And you refused to answer certain questions which have been testified to here before the grand jury the other day?
A. I did.
Q. And when you refused to answer those questions did you state your reasons?
A. I did.
Q. And what were your reasons that you stated, what reason did you state?
A. I refused to answer for the reason that it might tend to incriminate me.
Q. Now that was when those questions were first put to you?
A. Yes sir when they were first put to me.
Q. After the Judge directed you to answer them was your refusal based on the same reason?
A. I refused,—when I returned I told them I refused and I thought it was understood that I refused on the same ground and none of the grand jury asked me and I didn't state the reason.
Q. You didn't report your reason?
A. I didn't the second time I returned but I thought it was self evident to them they knew my reason. The foreman didn't ask me.
Q. How long after you refused the first time was it that you were sent back the second time?
A. I think something like an hour and a half. I went in there first and was excused from the room but not from the building and after Hanson went in the court was convened and we were called in here.
36 Q. You were present in here when the matter went before the court?
A. I was.
Q. The grand jury was present?
A. Yes sir.

Q. And immediately upon the Court's order you repaired to the grand jury room and refused to answer?
A. I was sent back, yes sir, and refused to answer.
Q. Did anybody order you to answer the questions when you went back the second time?
A. I don't think they did, I am almost positive they didn't.

The foregoing is all of the testimony of said witness.

And thereupon Mr. A. HANSON was called as a witness on behalf of the defendants and being duly sworn testified as follows:

Direct examination.

(By Mr. GRIGSBY:)

Q. Mr. Hanson you are one of the defendants in this case?
A. I am.
Q. And you heard the testimony to the effect that you refused to answer certain questions before the grand jury the other day?
A. I did.
Q. When these questions were first propounded to you did you state to the grand jury your reason for refusing to answer?
—. ——.
Q. What reason did you state?
A. I stated on the ground that it might incriminate me.
Q. And after being directed by the court to answer the questions were the questions again put to you?
A. The same questions and I refused.
Q. Did you at that time state your reason again?
37 A. I did not. I thought it was understood the District Attorney and grand jury would know I was refusing on the same ground.
Q. The District Attorney and grand jury were present when the matter was presented before the court?
A. Yes sir.
Q. And when you went back the second time in the grand jury room, did anybody order you to answer the questions?
A. No sir.
Q. Were the same questions asked you again?
A. The same questions were asked me by the District Attorney and he asked me if I refused and I said I did.
Q. Did anybody order you to answer them?
A. No sir.

The foregoing is all of the testimony of the said witness, and the foregoing is all of the testimony which was given and admitted on the trial in said cause.

Whereupon counsel for the defendants demurred to the evidence and asked that the defendants be discharged, which said demurrer was overruled and an exception duly allowed.

Whereupon the Court ordered that each defendant pay a fine of One Hundred Dollars and that they be committed to the custody

of the U. S. Marshal until they answer the questions alleged in the affidavit, which order is as follows:

In the District Court for the District of Alaska, Second Division.

UNITED STATES, Plaintiff,

vs.

CHAS. MASON and A. HANSON, Defendants.

Determination and Sentence.

Now on this 6th day of April, 1916, this cause coming on for hearing in open court, the plaintiff appearing by F. M. Saxton, United States Attorney, and the defendants appearing in
38 person and by Geo. B. Grigsby and Hugh O'Neill, their attorneys, and the court having heard the evidence adduced by both plaintiff and the defendants, and having heard the arguments of counsel, and being now fully advised in the premises finds the defendants, Chas. Mason and A. Hanson, guilty of the contempt charged.

It is therefore considered, ordered and adjudged that said defendants, and each thereof, be confined in the Federal Jail at Nome, Alaska, until such time as they, and each thereof, shall appear before the grand jury of this Division, now in session and answer the questions propounded to each of them respectively as set forth in the "affidavit for contempt" filed herein.

And it is further considered, ordered and adjudged that said defendant, Chas. Mason, be and he hereby is fined the sum of One Hundred Dollars, and that in default of the payment of such fine, or any part thereof, he be confined in the Federal Jail of Nome, Alaska, one day for each two dollars of such fine, not exceeding fifty days.

And it is further considered, ordered and adjudged that the defendant A. Hanson be, and he hereby is fined the sum of One Hundred Dollars, and that in default of the payment of said fine, or any part thereof, he be confined in the Federal Jail at Nome, Alaska, one day for each two dollars of said fine not exceeding fifty days.

And it is further ordered that said defendants be remanded to the custody of the United States Marshal for the Second Division, District of Alaska, for the execution of this sentence.

Dated this 7th day of April, 1916.

J. R. TUCKER,
District Judge.

39 Thereupon defendants excepted to said order and judgment and their exceptions were duly allowed.

And now in furtherence of justice and that right may be done, the defendants present and tender the foregoing as their Bill of Ex-

ceptions in the above entitled cause and pray that the same may be settled and allowed and that the same may be signed and certified to by the above entitled court and become and be made a part of the record in the above entitled cause.

GEO. B. GRIGSBY AND
HUGH O'NEILL,
Attorneys for Defendants.

Order Settling and Allowing Bill of Exceptions.

UNITED STATES OF AMERICA,
Territory of Alaska, Second Division, ss:

Be it remembered that on this — day of April, 1916, Charles Mason and A. Hanson, the defendants in the above entitled cause, having duly served and filed the foregoing Bill of Exceptions and duly presented the same for settlement and allowance by the court within the time allowed by law and extensions thereof duly made upon consent of counsel by orders of the above entitled court entered on record therein, and the court having examined the said bill of exceptions and the same having been corrected until made conformable to the truth, and it appearing to the court that the foregoing bill of exceptions is in all respects full, true and correct and that it contains all of the evidence and testimony given upon the trial of the foregoing cause, and that it contains a true and correct statement of the rulings of the court and the exceptions reserved and allowed and contains all of the proceedings upon the trial of said cause,

It is therefore ordered and adjudged that the said bill of exceptions be, and the same is hereby settled and allowed as the bill of exceptions of the said defendants Charles Mason and A. Hanson in the above entitled cause and the same is hereby made a part of the record in said cause.

Done in open Court at Nome, Alaska, in the Second Division in the Territory of Alaska, this 18th day of April, 1916.

J. R. TUCKER,
District Judge.

Due service of the foregoing proposed bill of exceptions is hereby acknowledged at Nome, Alaska, this 15th day of April, 1916.

F. M. SAXTON,
U. S. District Attorney.

Due service of the foregoing bill of exceptions as settled and allowed by the Court is hereby admitted at Nome, Alaska, this 17th day of April, 1916.

F. M. SAXTON,
U. S. District Attorney.

Endorsed: #1034. Crim. In the United States District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 17, 1916. G. A. Adams, Clerk, By W. C. McG., Deputy.

41 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Assignment of Errors.

Come now the defendants Charles Mason and A. Hanson, the plaintiffs in error, and file the following assignment of errors upon which they rely in the prosecution of their writ of error in the above entitled cause:

I.

The Court erred in overruling the defendants' demurrer to the affidavit for contempt upon the grounds:

1st. That the said affidavit for contempt does not state facts sufficient to constitute a cause of action.

2nd. That the said affidavit contains no order attached thereto marked "Exhibit A" which order purports to be a part of said affidavit.

3rd. That that certain order entered in the matter of the report of the grand jury in reference to Charles Mason and A. Hanson dated the 4th day of April, 1916, is void on the ground that the Court had no jurisdiction to enter it.

4th. That said affidavit for contempt does not substantially conform to the requirements of Chapter 7 of Title XV of the Compiled laws of Alaska.

5th. That more than one crime is charged in the said affidavit for contempt.

To which ruling the defendants then and there duly excepted and an exception was then and there allowed.

42 II.

The court erred in overruling the objection made by the defendants to the introduction in evidence of the document marked "Plaintiff's Exhibit A," to which ruling the defendants then and there duly excepted and an exception was then and there allowed.

III.

The court erred in overruling the objection of the defendants to the introduction in evidence of a document marked "Plaintiff's Exhibit B" to which ruling the defendants then and there duly excepted and an exception was allowed.

IV.

The Court erred in overruling the objection of the defendants to the following question asked the witness Frank P. Williams:

Q. State whether or not at that time this question was asked Charles Mason "Was there a game of cards being played on this particular evening at the table at which you were sitting?

Mr. Grigsby: Objected to as leading.

Mr. Saxton: I am asking whether that question was asked.

The Court: Overrule the objection.

To which ruling the defendants then and there excepted and an exception was then and there allowed.

V.

The court erred in refusing to permit the defendants to call Judge Tucker as a witness on behalf of the defendants in said action, as follows:

Mr. Grigsby: I will have to call the Court as a witness. I call Judge Tucker.

The Court: Mr. District Attorney, you will have to defend the Court.

Mr. Saxton: I don't think it is proper to call the Court in this case. The Court's actions are a matter of record in this case.

Mr. Grigsby: That depends upon the questions I ask him. I
43 have a right to call the Court in any case, if the Court please. The Court is a competent witness. I don't call the Court, I call the Judge and ask that he be sworn.

Mr. Saxton: I object to such a proceeding.

The Court: I sustain the objection.

To which ruling the defendants then and there duly excepted and an exception was duly allowed.

VI.

The Court erred in overruling the defendants' demurrer to the evidence and in denying the defendants' request that they be forthwith discharged, to which ruling the defendants then and there duly excepted and an exception was then and there allowed.

VII.

The Court erred in its determination and sentence to which ruling the defendants then and there excepted and an exception was then and there duly allowed.

Wherefore the said Charles Mason and A. Hanson, plaintiffs in error, pray that the judgment of the District Court for the District of Alaska, Second Division, be refersed, set aside and held for naught, and that judgment be rendered for plaintiffs in error granting them their rights under the statutes and laws of the United States.

GEO. B. GRIGSBY,
HUGH O'NEILL,
Attorneys for Defendants.

Endorsed: #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America, Plaintiff vs. Charles Mason and A. Hanson, Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Apr. 18, 1916. G. A. Adams, Clerk, By —— ——, Deputy.

44 In the District Court for the District of Alaska, Second Division.

No. —.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Undertaking on Appeal.

A judgment having been given on the 7th day of April, 1916, whereby Charles Mason and A. Hanson were each of them adjudged guilty of contempt of court and each of them sentenced to pay a fine of One Hundred ($100.00) Dollars and in default of such payment to be confined in the Federal Jail of Nome, Alaska, one day for each two dollars of such fine not exceeding fifty days and the said defendant Charles Mason having been committed to the custody of the United States Marshal for the execution of said judgment and he desiring to appeal from said judgment and having been duly admitted to bail in the sum of Two Hundred and Fifty ($250.00) Dollars,

We, Antonio Polet, of Nome, Alaska, be occupation a merchant, and J. Kirstan of Nome, Alaska, be occupation a merchant as sureties, hereby undertake that the above named Charles Mason shall in all respects abide and perform the orders and judgments of the Appellate Court upon the appeal and if the judgment appealed from is affirmed on appeal, we further undertake that said Charles Mason will appear and satisfy said judgment; or if he fail to do so in any

particular that we will pay to the United States the sum of Two Hundred and Fifty ($250.00) Dollars.

Dated at Nome, Alaska, this 27th day of April, 1916.

CHAS. MASON.
ANTONIO POLET.
J. KRISTAN.

45 UNITED STATES OF AMERICA,
Territory of Alaska, Second Division, ss:

Antonio Polet and J. Kirstan, being duly sworn, each for himself and not one for the other, deposes and says:

That I am a resident of Nome, Alaska, and one of the sureties mentioned in the above undertaking; that I am not a counselor or attorney-at-law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court, that I am worth the sum of Two Hundred and Fifty ($250.00) Dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

ANTONIO POLET.
J. KRISTAN.

Subscribed and sworn to before me this 27th day of April, 1916.

[NOTARIAL SEAL.] D. B. CHACE,
Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires May 12th, 1917.)

Taken and acknowledged before me this the 27th day of April and year above written.

J. R. TUCKER,
District Judge.

Endorsed: #1034. C. In the District Court for the District of Alaska, 2nd Div. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Undertaking on Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 27, 1916. G. A. Adams, Clerk, By ——, Deputy. F. W. L.

46 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Undertaking on Appeal.

A judgment having been given on the 7th day of April, 1916, whereby Charles Mason and A. Hanson were each of them adjudged

guilty of contempt of court and each of them sentenced to pay a fine of One Hundred ($100.00) Dollars and in default of such payment to be confined in the Federal Jail of Nome, Alaska, one day for each two dollars of such fine not exceeding fifty days; and the said defendant A. Hanson having been committed to the custody of the United States Marshal for the execution of said judgment and he desiring to appeal from said judgment and having been duly admitted to bail in the sum of Two Hundred and Fifty ($250.00) Dollars,

We, Frank J. Mielke of Nome, Alaska, by occupation a Barber, and J. W. Rose, of Nome, Alaska, by occupation a merchant, as sureties, hereby undertake that the above named A. Hanson shall in all respects abide and perform the orders and judgments of the Appellate Court upon the appeal and if the judgment appealed from is affirmed on appeal, we further undertake that said A. Hanson will appear and satisfy said judgment; or if he fail to do so in any particular that we will pay to the United States the sum of Two Hundred Fifty ($250.00) Dollars.

Dated at Nome, Alaska, this 3rd day of May, 1916.

A. HANSEN, *Principal.*
FRANK J. MIELKE,
J. W. ROSE,
Sureties.

47 UNITED STATES OF AMERICA,
Territory of Alaska, Second Division, ss:

Frank J. Mielke and J. W. Rose, being duly sworn, each for himself and not one for the other, deposes and says:

That I am a resident of Nome, Alaska, and one of the sureties mentioned in the above undertaking; that I am not a counselor or attorney-at-law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court; that I am worth the sum of Two Hundred and Fifty ($250.00) Dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

FRANK J. MIELKE.
J. W. ROSE.

Subscribed and sworn to before me this 3rd day of May, 1916.

[NOTARIAL SEAL.] D. B. CHACE,
Notary Public for the Territory of Alaska,
Residing at Nome.

(My commission expires May 12, 1917.)

Taken and acknowledged before me the day and year above written.

J. R. TUCKER,
District Judge.

Endorsed: #1034. C. In the District Court for the District of Alaska, 2nd Div. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Undertaking on Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 3, 1916. G. A. Adams, Clerk, By W. C. McG., Deputy.

48 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Petition for Writ of Error.

Come now the above named Charles Mason and A. Hanson, by and through their attorneys George B. Grigsby and Hugh O'Neill and say that on the 7th day of April, 1916, a judgment in this case was entered by the said court against Charles Mason and A. Hanson and said judgment became and is final, and the said Charles Mason and A. Hanson were and are aggrieved in that in said judgment and the proceedings had prior thereto in this case certain errors were committed to their prejudice. That this is an action brought under the Compiled laws of Alaska relating to contempt of court and that by this action there was drawn in question the construction of the constitution of the United States and the decision of this court as against the rights claimed by the said Charles Mason and A. Hanson and as they believe, contrary to the constitution of the United States and the rights of Charles Mason and A. Hanson thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore the said Charles Mason and A. Hanson pray that a writ of error may issue to the District Court for the District of Alaska, Second Division for the correcting of the errors complained of and that a duly authenticated transcript of the records, proceedings and papers herein may be sent to the United States Supreme Court.

Dated May 5th, 1916.

GEO. B. GRIGSBY,
HUGH O'NEILL,
Attorneys for Plaintiffs in Error.

49 Endorsed: #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Petition for Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 5, 1916. G. A. Adams, Clerk, By W. C. McG., Deputy.

50 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Order Allowing Writ of Error.

Charles Mason and A. Hanson the plaintiffs in error above named, on this 5th day of May, 1916, having filed and presented to this court their petition praying for the allowance of a writ of error intended to be urged by them and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had in the premises as may be just and proper, and upon consideration of the said petition this court, desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions herein presented.

It is ordered by this court that a writ of error be, and the same is allowed as prayed and that said writ shall operate as a supersedeas.

Witness my hand at Nome, Alaska, this 5th day of May, 1916.

J. R. TUCKER,
District Judge.

Endorsed: #1034. Crim. In the District Court for the District of Alaska, Second Division. United States of America, vs. Charles Mason and A. Hanson, Defendants. Order Allowing Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 5, 1916. G. A. Adams, Clerk, By W. C. McG., Deputy.

51 In the District Court for the District of Alaska, Second Division.

No. —.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CHARLES MASON and A. HANSON, Defendants.

Writ of Error.

(Lodged Copy.)

The President of the United States of America to the Honorable the Judges of the District Court for the District of Alaska, Second Division, Greeting:

Because of the records and proceedings and also in the rendition of the judgment which is in the said District Court already made between the United States of America, plaintiff and Charles Mason and A. Hanson, defendants, a manifest error hath happened to the great damage of the said defendants as is said and appears by the petition herein,

We, being willing that error, if any hath been, — and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Judges of the Supreme Court of the United States at Washington, D. C. together with this writ so as to have the same at said place in court on the 3rd day of July 1916, and that the record and proceedings aforesaid, being inspected the said Supreme Court of the United States may cause further to be done therein to correct these errors, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of The Supreme Court of the United States this 5th day of May 1916.

52 Attest: My hand and the seal of the U. S. District Court for the Second Division of the District of Alaska, on the day and year last above written.

(Court Seal.)

G. A. ADAMS,
Clerk of the District Court for the District of Alaska, Second Division.

The above and foregoing Writ of Error is hereby allowed this 5th day of May, 1916.

____ ____,
District Judge.

Endorsed: #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Writ of Error. (Lodged Copy.) Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 5, 1916. G. A. Adams, Clerk, By W. C. McG., Deputy.

53 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Order Enlarging Time to File Record.

On motion of George B. Grigsby and Hugh O'Neill, counsel for defendants, the time for filing the record in the above entitled cause in the U. S. Supreme Court is hereby extended to and until the 3rd day of August, 1916.

Done in open court at Nome, Alaska, this 5th day of May, 1916.

J. R. TUCKER,
District Judge.

Endorsed: #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Order Enlarging Time to File Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, May 5, 1916. G. A. Adams, Clerk, By W. C. McG., Deputy.

54 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Præcipe for Transcript of Record.

To the Clerk of the above-entitled court:

You will please make transcript of the following papers and minute orders herein:

Affidavit for contempt, minute order setting case for trial, demurrer, minute order overruling demurred, minute order defendants entering plea of not guilty, determination and sentence, opinion,

minute order extending time to file bill of exceptions, minute order allowing bill of exceptions, bill of exceptions, assignment of errors, undertakings on appeal, petition for writ of error, order allowing writ of error, lodged copy of writ of error, order enlarging time to file record, citation and original writ of error to be attached.

GEORGE B. GRIGSBY,
HUGH O'NEILL,
Attorneys for Defendants.

Endorsed: 1034. Crim. In the District Court for the District of Alaska, Second Div. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Præcipe for Transcript of Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, May 15, 1916. G. A. Adams, Clerk, By W. C. McG., Deputy.

55 In the District Court for the District of Alaska, Second Division.

No. 1034. Crim.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Clerk's Certificate.

I, G. A. Adams, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 60, both inclusive, are a true and exact transcript of the Affidavit for contempt, Minute Order setting case for trial, Demurrers, Minute order overruling demurrer, Minute order defendants entering plea of not guilty, Determination and sentence, Opinion, Minute order extending time to file bill of exceptions, Minute order allowing bill of exceptions, bill of exceptions, assignment of errors, undertakings on appeal, petition for writ of error, order allowing writ of error, lodged copy of writ of error, order enlarging time to file record, and Præcipe for Transcript of Record, in the case of United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants, No. 1034 Crim., this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska: and further certify that the original Writ of Error and Original Citation in the above entitled cause are attached to this transcript.

Cost of transcript $23.15, paid by Geo. B. Grigsby, of attorneys for defendants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 17th day of June, A. D. 1916.

[Seal United States District Court, District of Alaska, Second Division.]

G. A. ADAMS, *Clerk.*

56 In the District Court for the District of Alaska, Second Division.

No. —.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Writ of Error.

(Original.)

The President of the United States of America to the Honorable the Judge of the District Court for the District of Alaska, Second Division, Greeting:

Because of the records and proceedings and also in the rendition of the judgment which is in the said District Court already made between the United States of America, plaintiff and Charles Mason and A. Hanson, defendants, a manifest error hath happened to the great damage of the said defendants as is said and appears by the petition herein,

We, being willing that error, if any hath been, — and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Judges of the Supreme Court of the United States at Washington, D. C. together with this writ so as to have the same at said place in court on the 3rd day of July, 1916, and that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein to correct these errors, what of right and according to the laws and customs of the United States should be done.

57 Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 5th day of May, 1916.

Attest: My hand and the seal of the U. S. District Court for the

Second Division of the District of Alaska, on the day and year last above written.

[Seal United States District Court, District of Alaska, Second Division.]

G. A. ADAMS,
Clerk of the District Court for the District of Alaska, Second Division.

The above and foregoing Writ of Error is hereby allowed this 5th day of May, 1916.

J. R. TUCKER,
District Judge.

Due service and receipt of the within Writ of Error is hereby admitted this 5th day of May, 1916.

____ ____,
U. S. District Attorney.

58 [Endorsed:] #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America. Plaintiff, vs. Charles Mason & A. Hanson, Defendants. Writ of Error. (Original.)

59 In the District Court for the District of Alaska, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MASON and A. HANSON, Defendants.

Citation.

(Original.)

The President of the United States of America to F. M. Saxton, United States Attorney for the District of Alaska, Second Division, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in the City of Washington, District of Columbia, on the 3rd day of July, 1916, pursuant to a writ of error filed in the Clerk's office of the District Court for the District of Alaska, Second Division, wherein Charles Mason and A. Hanson are the plaintiffs in error and you represent the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 5th day of May, 1916.

J. R. TUCKER,
District Judge.

Attest:

[Seal United States Dist[illegible] Court, District of Alaska, Second [illegible]ion.]

G. A. ADAMS,
Clerk of the District Court for the District of Alaska, 2nd Div

Service of the foregoing citation admitted by copy this 5th day of May, 1916.

F. M. SAXTON,
U. S. District Attorney.

60 & 61 [Endorsed:] #1034. Crim. In the District Court for the District of Alaska, 2nd Division. United States of America, Plaintiff, vs. Charles Mason and A. Hanson, Defendants. Citation. (Original.)

62 [Endorsed:] No. 1034. Crim. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Chas. Mason and A. Hanson, Defendant-. Transcript on Apeal.

Endorsed on cover: File No. 25,434. Alaska District Court, Second Division. Term No. 604. Charles Mason and A. Hanson, plaintiffs in error, vs. The United States. Filed August 7, 1916. File No. 25,434.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

CHARLES MASON AND A. HANSON, PLAINTIFFS IN ERROR,
v.
THE UNITED STATES.

No. 604.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES ALASKA, SECOND DIVISION.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Mason and Hanson were witnesses before a grand jury for the Second Division of the District of Alaska engaged in an investigation of a charge of gambling against certain other persons. After being duly sworn, both witnesses were asked certain questions which they refused to answer on the ground that their answer would violate their privilege against self-incrimination guaranteed by the Fifth Amendment.

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Thereupon the foreman of the grand jury filed in the District Court of the United States for the District of Alaska an affidavit setting forth the facts, and the witnesses were cited for contempt. They filed a demurrer to the affidavit, which was overruled, and witnesses were found guilty of contempt and fined $100 each. In default of the payment of such fines they were ordered to be confined in the Federal jail at Nome, Alaska, one day each for each two dollars of such fine, not exceeding fifty days. A writ of error directly from this court was allowed by the District Court.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

CHARLES MASON AND A. HANSON, Plaintiffs in Error. *v.* THE UNITED STATES.	No. 604.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

MEMORANDUM BY THE UNITED STATES IN OPPOSITION TO MOTION TO REASSIGN OR CONTINUE.

Mason and Hanson were witnesses before a grand jury for the Second Division of the District of Alaska engaged in an investigation of a charge of gambling against certain other persons. After being duly sworn, both witnesses were asked certain questions which they refused to answer on the ground that their answer would violate their privilege against self-incrimination guaranteed by the Fifth Amendment.

Thereupon the foreman of the grand jury filed in the District Court of the United States for the District of Alaska an affidavit setting forth the facts, and the witnesses were cited for contempt. They filed

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demurrers to the affidavit, which were overruled, and the witnesses were found guilty of contempt and fined $100 each. In default of the payment of such fines they were ordered to be confined in the Federal jail at Nome, Alaska, one day for each $2 of such fine, not exceeding 50 days. A writ of error directly from this court was allowed by the District Court.

The case was docketed here on August 7, 1916. On November 21, 1916, the undersigned wrote to counsel for plaintiffs in error stating that a motion to advance the case would be presented by the Government on January 8, 1917, or as soon thereafter as counsel could be heard. Failing to receive any response, the submission of the motion was deferred. On January 13, 1917, a telegram was sent to the United States Attorney for the District of Alaska directing him to advise Mr. Grigsby, senior opposing counsel, that the motion to advance would be submitted on January 29, 1917.

On January 18, 1917, Mr. Grigsby advised the department as follows:

> United States District Attorney Smizer referred to me a telegram from the Solicitor General of recent date, asking him to notify Melvin Grigsby that a motion would be made on January 29th to advance the case of *Mason and Hanson* v. *The United States*. This telegram was shown to me on my return to Juneau this week.
>
> Mr. Melvin Grigsby, to whom the telegram referred, lives in Sioux Falls, S. D., and was

entered in the case by myself when I resided at Nome, Alaska, for purposes of convenience. Since that time he has been very sick and unable to attend to the case in any respect.

I would not object to consenting to your motion to advance the case, providing it would not result in its coming up for hearing until some time when I am able to be present to argue it.

As you are probably not aware, I was, at the last general election on November 7, 1916, elected Attorney General of the Territory of Alaska, and take office as such on March 1, 1917. Pending that time, I am occupying the position of Territorial counsel under appointment by the Governor of Alaska.

The legislature of the Territory of Alaska convenes March 5th for a 60-day session, and I will be required to be present during the entire session to advise and assist them. During the month of February, I will have cases to argue for the Territory in the Circuit Court of Appeals, so you see that it is absolutely impossible for me to be in Washington prior to the adjournment of the legislature on the 30th day of April, 1917.

I will also be compelled to attend court in San Francisco, Circuit Court of Appeals at the May term, so that I could not possibly consent to a setting of the Mason and Hanson case before sometime in June.

If you succeed in getting the case advanced, I wish you would consider this situation and have it set for sometime this year, any time after June 1st, when I can be present. My clients are such that I must either attend to

this case personally, *or hire a lawyer to do it for me, which I can ill afford to do.*

I trust you will take such action as will accommodate me, so far as you can, consistent with the interests of the United States. [Italics ours.]

The Government, realizing its duty to dispose as rapidly as possible of all criminal cases on the docket of this court and, believing, in the light of past history, that this court would not hear arguments after some time in May and would probably adjourn for the term in June; and it further appearing that the court does not customarily listen with patience to requests for postponements based upon engagements of counsel in other courts, declined the request of opposing counsel and presented the motion to advance on January 29, 1917, which was granted on February 5, 1917, and the case was assigned for hearing on April 9, 1917. The Government, by telegram dated February 6, 1917, duly notified opposing counsel of the court's action on the motion to advance.

To the latter telegram, opposing counsel responded with objections based upon reasons stated in the letter of January 18, 1917, above referred to, and again requested that the Government arrange to have the case set for hearing on a date not earlier than June, 1917. Since the receipt by the department of this last letter, local counsel have called at the department requesting concurrence by the Government in a motion to reassign or continue the case.

In his affidavit filed in support of the motion, Mr. Grigsby claims that in February he was advised by the clerk of this court that a copy of the printed record had been mailed to him but that he has never received it, and further that it would be impossible, even if he had a copy of the record, to prepare a brief within the short period of time between now and April 9, the date set for the hearing.

It appears that the clerk of this court forwarded the printed record to Mr. Grigsby at Nome, Alaska, his former address, instead of to Juneau, his present address.

Blame for the nonreceipt of this record certainly can not be attributed to any fault of the Government. On the contrary, if Mr. Grigsby had been on the alert and interested in the prosecution of this writ of error, he would have realized that after entering the original appearance in this court it became his duty to advise the court of any subsequent change either in counsel or address.

It is obvious from the history of the correspondence concerning the advancement of the case that the Department of Justice has been fair in its dealings with opposing counsel; that the latter has had ample time within which to procure a copy of the record and prepare a brief; and it would seem that if his official and other duties required his presence elsewhere at the time set for hearing he could have employed local counsel to prepare a brief and argue the case just as he has secured local counsel to present the pending motion.

It is submitted that the pending motion should therefore be denied.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1917.

O

Office Supreme Court, U. S.
FILED
APR 21 1917
JAMES D. MAHER
CLERK

In the

Supreme Court of the United States

NO 604

CHARLES MASON AND A. HANSON,
Plaintiffs in Error

vs.

THE UNITED STATES

BRIEF FOR PLAINTIFFS IN ERROR

GEORGE B. GRIGSBY,
Attorney for Plaintiffs in Error.

IN THE

Supreme Court of the United States

CHARLES MASON AND A. HANSON,
Plaintiffs in Error,

vs.

THE UNITED STATES.

No. 604
Brief of Plaintiffs In Error

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, SECOND DIVISION

STATEMENT OF THE CASE

On the 4th day of April, 1916, the Grand Jury of the District Court for the District of Alaska, Second Division, were engaged in investigation a charge of gambling against Ed Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson and Adelbert Gumaer. Plaintiff in Error, Chas. Mason was sworn as a witness before the Grand Jury and testified that he was present, sitting at a table in a place called the Arctic Billiard Parlors in Nome, Alaska at the

time the above named persons were arrested upon said charge of gambling, but refused to answer the following questions:

"Was there a game of cards being played on this particular evening at the table at which you were sitting?"

"Was there a game of cards being played at another table at the time.

At the time the said Plaintiff in Error, Mason refused to answer the above questions, he gave as a reason for such refusal that the answers might tend to incriminate him. Thereafter on said 4th of April, 1916, the matter having been presented by the Grand Jury to the Court of said District and Division, Plaintiff in Error was directed to return to the Grand Jury room and answer the aforesaid questions. Upon returning to the Grand Jury room, Plaintiff in Error persisted in his refusal to answer the first of the above questions, but answered the second.

The Writ or Error is prosecuted from the judgment of the Court adjudging Plaintiff in Error guilty of contempt of Court for refusal to obey the order of the Court to appear before the Grand Jury and answer the first of the questions above set forth to-wit:

"Was there a game of cards being played on this particular evening at the table at which you were sitting?"

Plaintiff in Error, A. Hanson was also sworn

as a witness before the same Grand Jury on April 4th, 1916, to testify with reference to the aforesaid investigation of a charge of gambling, and testified that he was present sitting at a table in the said Arctic Billiard Parlors on the occasion of the arrest of the above named persons, but refused to answer the following questions, giving as a reason that the answers would tend to incriminate him:

"If at the time and just prior to the time that yourself and others were arrested in the Arctic Billiard Parlors, you saw anyone there playing 'stud poker' or 'pangingi?' "

"If at the time you saw anyone playing a game of cards at the table at which you were sitting?"

Hanson was directed by the Court to answer the above questions, returned to the Grand Jury room and persisted in his refusal to answer.

Plaintiff in Error, Hanson, is prosecuting this Writ from the judgment of the Court below, adjudging him guilty of contempt of Court for his refusal to answer the aforesaid questions. The affidavit for contempt upon which the defendants were tried sets forth the facts substantially as above stated.

The defendants were found guilty of contempt of Court by the trial judge and each sentenced to be confined in the Federal Jail at Nome, Alaska, until such time as they should appear before the Grand Jury and answer the questions which they had refused to answer, and were also each sentenced to pay a fine of One Hundred ($100.00)

dollars, and in default thereof, to be confined in the Federal Jail at Nome, Alaska, one day for each two ($2.00) dollars of said fine, not exceeding fifty (50) days.

The instrument upon which defendants were tried is designated as the "Affidavit for Contempt," and is set forth in full on pages 1, 2 and 3 of the Transcript of Record. From this affidavit it appears that the defendants were charged with refusing to answer certain questions before the Grand Jury as directed in a certain order of the Court, the order being attached to the affidavit for contempt, made a part thereof and designated as "Exhibit A." The original of this order was introduced in evidence on the trial of the case as "Plaintiff's Exhibit B." (Transcript of Record, Page 16), the evidence of the Witness Adams, Transcript of Record page 17, and of the Witness Saxton, Transcript of Record, page 22, discloses that this order was prepared by the United States Attorney, Saxton and signed by the Court and filed on the 5th day of April, 1916, the day following the commission of the alleged offense.

Upon the introduction in the evidence of this original order, the defendants objected to its admissibility on the ground that it was not executed until after the alleged refusal of the defendants to obey it. Thus the question is raised whether or not the defendants could be legally convicted of contempt, consisting of violation of an order of the

Court upon a complaint setting forth that the order was in writing and upon evidence showing it to have been made subsequent to the commission of the alleged offense.

An objection was also made to the introduction of any evidence in the case on the ground that two separate defendants were charged in the affidavit for contempt with two separate acts of contempt. The only other and the important question in the case is raised by the demurrer to the affidavit for contempt on the ground that the affidavit does not state facts sufficient to constitute a cause of action, the same question being raised by defendants' demurrer and motion to discharge the defendants. The precise point raised by this demurrer and motion is whether or not the questions propounded to Plaintiffs in Error and to each of them, were of such an incriminating character as to justify plaintiffs in persisting in their refusal to answer them after being ordered so to do by the Court.

SPECIFICATIONS OF ERROR

Plaintiffs in Error rely upon the following errors set forth in the Assignment of Errors, pages 27 and 28, Transcript of Record:

I.

The Court erred in overruling the defendants' demurrer to the affidavit for contempt, the grounds of the demurrer being:

That the said affidavit for contempt does not state facts sufficient to constitute a cause of action.

That that certain order entered in the matter of the report of the Grand Jury in reference to Chas. Mason and A. Hanson dated the 4th day of April, 1916, is void on the ground that the Court had no jurisdiction to enter it.

II.

The Court erred in overruling the objection made by the defendants to the introduction in evidence of the document marked "Plaintiff's Exhibit A," which is fully set forth on page 15 of the Transcript of Record and purports to be a communication from the foreman of the Grand Jury reciting the circumstances attending the refusal of Plaintiffs in Error to answer certain questions set forth in said exhibit.

III.

The Court erred in overruling the objection of the defendants to the introduction in evidence of a document marked "Plaintiff's Exhibit B," said document being an order of the Court which recites the circumstances which took place before the Grand Jury and directs the defendants to appear before the Grand Jury and answer certain questions set forth in said order.

IV.

The Court erred in overruling the defendants' demurrer to the evidence and in denying the defendants' request that they be forthwith discharged, to which ruling the defendants then and there duly excepted and an exception was then and there allowed.

ARGUMENT

I.

The first and fourth specifications of error upon which Plaintiffs in Error rely, involve the same question which is whether or not the questions propounded to Plaintiffs in Error and each of them were of such a character as to justify Plaintiffs in Error to refuse to answer them on the ground of their incriminatory tendency. In other words, were the circumstances such and the questions of such a nature as to entitle Plaintiffs in Error to invoke the protection of the 5th amendment to the Constitution of the United States.

Plaintiffs in Error rely upon the rule enuncited by Chief Justice Marshall in the trial of Aaron Burr in 1807.

> "If the question be of such a description that an answer to it may or may not criminate the witness according tothe purport of that answer, it must rest with himself, who only can tell what it would be, to answer the question or not. If, in such a case he say upon his oath that his answer would criminate himself, the Court can demand no other testi-

mony of the fact . . . . . according to their statement (Counsel for the United States.)

'A witness can never refuse to answer any question unless that answer unconnected with other testimony would be sufficient to convict him of crime.'

This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient . . . . . The rule which declares that no man is compellable to accuse himself would most obviously be infringed upon by compelling a witness to disclose a fact of this description . . . . . It would seem then that the Court ought never to compel a witness to give an answer which would disclose a fact that would form a necessary and essential part of a crime, which is punishable by the laws."

25 Fed. Cas. 38.

The foregoing rule has been followed in many cases and has never been departed from in any cases of authority in the United States. It is cited

with approval by the Supreme Court in Counselman vs. Hitchcock, 142 U. S. 547 and in Brown v. Walker 161 U. S. 591.

The only question to determine, therefore, is whether or not the questions propounded to Plaintiffs in Error were of a character which "might or might not criminate them, according to the purport of the answer." The Trial Court in its opinion in this case adopted the construction of the rule laid down by Chief Justice Marshall in the Burr case made by Judge Taft in Ex Parte Irvine 74 Federal 954. In the latter case, the Court says

> "It must appear to the Court from the character of the question and the facts adduced in the case that there is some tangible and substantial probability that the answer of the witness may help to convict him of the crime."

We are willing to apply the foregoing rule to this case. To show that the questions propounded to Plaintiffs in Error fall easily within this rule it is only necessary to illustrate, and no better illustration of how the answers to the questions propounded to Plaintiffs in Error might afford a tangible and substantial probability of their conviction of a crime can be given than to recite the exact circumstances under which the questions were propounded.

As an illustration then, and also as a matter of fact, the gambling offense which the Grand Jury was investigating at the time Plaintiffs in Error

were summoned before them was alleged to have been committed some time the previous January. At the time of the commission of the alleged offense, the persons being investigated by the Grand Jury, being the same persons named in the affidavit for contempt, were arrested by United States deputy marshals. The Plaintiffs in Error, Chas. Mason and A. Hanson and a man named Nelson, together with said persons, were also arrested and charged jointly with them for the precise offense which was being investigated by the Grand Jury. This fact appears inferentially from testimony of Phil Holland, Pages 22 and 23 Transcript of Record. All the persons arrested, including Plaintiffs in Error and the man Nelson, were charged in the United States Commissioner's Court with gambling, and all were bound over to the Grand Jury with the exception of Plaintiffs in Error and Nelson. Although the evidence against the latter three was exactly the same as against the remaining persons, the charge against them was dismissed at the preliminary hearing for some reason known to the United States Attorney, and probably because he expected to use their testimony before the Grand Jury. At any rate he subpoenaed all three of them before the Grand Jury and it developed that the man Nelson was a stool pigeon, employed by the United States Marshal to sit in the game and furnish evidence of the commission of the offense. Nelson afterwards testified to these facts and was

the only witness who testified that the game was being played for money.

The Plaintiffs in Error, Mason and Hanson did not become immune from prosecution by reason of having the charge against them dismissed at the preliminary hearing. The only law of Alaska which authorizes the granting of immunity is Section 2254 of the Compiled Laws of Alaska, which is as follows

> "That when two or more persons are charged with the same indictment, the Court may at any time before the defendant has gone into his defense, on the application of the District Attorney direct any defendant to be discharged from the indictment so that he may be a witness for the United States."

Mason and Hanson then, when they were summoned before the Grand Jury had already been charged with the same offense as the other persons under investigation and were still subject to indictment. Being before a Grand Jury, they were necessarily not protected by the presence of counsel. The testimony of the deputy marshals who made the arrest, given at the preliminary hearing, presumably before the Grand Jury and afterwards at the trial, was that all the persons arrested, including Mason and Hanson, were sitting at one or the other of two card tables. That a game of "stud poker" was being played at one table, a game of "pangingi" at the other, and that all persons sitting

at each table were participating in the game conducted at such table. The witness Nelson testified on the above occasions, except at the preliminary hearing, that both games were being played for money.

On the trial, all defendants indicted, being all the persons mentioned in the affidavit for contempt, were charged in separate counts with having participated in both games at the same time. There was some contradiction among the witnesses as to which defendants were in the poker game and which were in the pangingi game. Under these circumstances, both those mentioned which had already occurred and those mentioned which afterward occurred and which, therefore, can be considered as likely to occur, Mason and Hanson, Plaintiffs in Error were subpoenaed before the Grand Jury and asked to tell where they were on the night of the arrest and what they were doing. Being without counsel, they admitted their presence in the Arctic Billiard Parlors; that they were sitting at one of the tables at which the game was being carried on, both of which facts were clearly criminating, but which they testified to freely, supposing, no doubt, that it was useless to refuse to disclose what had already been testified to by the deputy marshals. Mason refused, however, to admit that a game of cards was being played at the table at which he was sitting, and Hanson refused to testify whether he saw anyone playing

"stud poker" or "pangingi" at the time he was arrested, and also refused to testify whether he saw anyone playing a game of cards at the table at which he was sitting.

All the questions propounded to either Mason or Hanson were material to the matter under investigation. A crime of gambling with cards was charged, and being investigated. In order to secure an indictment, it was incumbent upon the District Attorney to prove, first; that a game of cards was being played. Second: To prove who was engaged in the game. Third: To prove that it was for money. He compelled two of the accused persons to appear before the Grand Jury and without cautioning them, allowed them to admit their presence at the scene of the alleged offense; to admit that they were sitting at the very table where the crime was being committed, and then sought to force them to testify to one of the essential elements of the offense, to-wit: That cards were being played, another essential element, towit: what the game was. His next step, if he had succeeded in securing answers to the last questions propounded, would naturally have been to secure testimony from the witnesses as to whether or not the game was being played for money, although probably a sense of propriety would have restrained him from attempting to force the witness to testify whether or not they were personally engaged in the game. As to this latter fact, however, he had the

testimony of the deputy marshals and of the Witness Nelson to the effect that all seated at the tables were engaged in playing. The Plaintiffs in Error are not in the position of witnesses who refused to furnish evidence of some fact, such as the mere statement of their names, or their place of residence, or other fact which might on some imaginary hypothesis be the one link wanted in the chain of proof against them. They were asked to testify to facts which, there was a very tangible and substantial probability, would help convict themselves. (See opinion of lower Court, quoting opinion of Judge Taft in Ex Parte Irvine 74 Fed. 954.) The facts they were asked to testify to were material against the other defendants and equally material against themselves.

Part of the illustration given above is based upon facts in the record and part on supposed facts, of equal force—as matters of illustration, and which actually occurred. The Court, in Counselman vs. Hitchcock, 142 U. S. 547, cites with approval State vs. Quarles, 13th Arkansas 307 as follows:

> "Quarles was indicted under a gaming law for betting money on a game of chance. A Nolle Prosequi having been entered as to one Neil, against whom a like prosecution was pending, Neil was sworn as a witness for the State and informed of the Nolle Prosequi and that no indictment for a similar offense would be preferred against him, and was asked

whether he had seen Quarles bet money at cards within a specified time. Neil refused to answer the question, alleging that he feared he would incriminate himself thereby. The trial Court refused to compel him to answer and the jury, having found for the defendant, the State appealed."

The trial Court in the Quarles case was reversed, but on account of the statute of the State of Arkansas which granted immunity to a witness sworn under such circumstances. It was conceded, however, at least the question was never raised, in the Quarles case, that the question propounded to the witness Neil was clearly criminating and undoubtedly, except for the existence of the statute, the trial Court would have been upheld in refusing to compel Neil to answer.

In this cause, the questions propounded to the Plaintiffs in Error are, on their face, far more clearly criminating than those put to the witness Neil in the Quarles case. The latter was asked if he had seen another person betting money at cards within a specified time. No attempt to fix the time, place, persons present nor the exact whereabouts of Neil himself. In this case, however, Plaintiffs in Error were asked to testify to, and admitted their presence at the precise spot where and the act time when the crime was alleged to have been committed.

We have endeavored to show that the questions propounded to Plaintiffs in Error "might or

might not have been criminating according to the purport of the answers." At the trial, counsel for the United States objected to such illustration as the foregoing on the ground that facts were assumed to exist which were not before the Court at the time the Plaintiffs in Error were ordered to answer the questions. This was true and necessarily so. The witnesses refused to answer certain questions before the Grand Jury; they were brought into Court; the matter was submitted to the Court; he was informed of the fact that certain questions had been propounded to witnesses and that they had refused to answer them and the reasons for their refusal.

It was for the Court, with this information presented to him, to determine whether or not the questions propounded were of such a character that the answers to them might or might not criminate the witnesses. He had no means of judging except from the questions themselves. What other evidence had been introduced before the Grand Jury, had nothing to do with the conclusion he might arrive at. It made no difference whether Mason and Hanson were the first witnesses called before the Grand Jury, or the last. It made no difference what had been the previous history of the gambling cases, or what would be the subsequent history. In determining the criminatory or non-criminatory character of the questions the Court

had a right to imagine any reasonably probable state of facts.

This, we have attempted to do inthis brief, using, however, the real facts of the case, believing them to afford a better illustration than any supposed facts which we might imagine.

Could the answers to the questions propounded on any reasonable hypothesis be criminatory? If they could, the witnesses under oath had a right to refuse to answer them on this ground.

The opinion of the trial Court concludes with the following statement:

> "The foregoing is only in response to the argument of counsel for the defendant as to what is an incriminating question and who is to determine its character, but I overrule the demurrer on the ground that the matter as to whether or not the questions put to these witnesses or defendants are incriminatory, cannot be raised in this way. The validity of my order for the defendants to answer to these questions can only be attacked by appeal or probably by habeas corpus proceedings should the defendants be committed."

How the learned trial Court arrived at this conclusion is an exceedingly difficult problem. In effect the Court says that no matter how clearly criminatory the questions might be, yet their refusal to answer them is a contempt of Court. If the Plaintiffs in Error had been asked if they had been playing in a game or cards for money at the time and place mentioned in the affidavit

for contempt and had refused to answer the question after being ordered so to do by the Court and contempt proceedings had been instituted against them, then the Court in effect says that they could not have attacked the validity of such an order except by appeal or habeas corpus proceedings. In the case of Counselman vs. Hitchcock cited above, the conclusion of the Court was as follows:

> "From a consideration of the language of the constitutional provisions and of all the authorities referred to, we are clearly of the opinion that the appellant WAS ENTITLED TO REFUSE AS HE DID TO ANSWER. THE JUDGMENT OF THE CIRCUIT COURT MUST THEREFORE BE REVERSED AND THE CASE REMANDED TO THAT COURT WITH A DIRECTION TO DISCHARGE THE APPELLANT FROM CUSTODY ON THE WRIT OF HABEAS CORPUS."

The above case, including the last quoted clause was read to the trial Court in the argument on the criminatory character of the questions put to Plaintiffs in Error. If the judgment of the trial Court is reversed, then this Court will in effect say, that the questions put to the Plaintiffs in Error were of a character which entitled them to refuse to answer, and that the judgment of the trial Court was wrong; that the trial Court should have adjudged them not guilty of contempt. The trial Court seems to take the position that it was powerless to find the defendants not guilty in the

first instance, but could only do so after a reversal.

II.

The second specification of error upon which Plaintiff's in Error rely is

"The Court erred in overruling the objection made by the Defendants to the introduction in evidence of the document marked "Plaintiff's Exhibit A," being a purported communication from the foreman of the Grand Jury to the Judge of the Court reciting the circumstances under which the Plaintiffs in Error refused to answer certain questions, set forth in said Exhibit.

When this exhibit was offered in evidence, defendants objected on the grounds stated on Page 15 of Transcript of Record. Among other grounds of objection was the following

> "That in the affidavit for contempt, two separate charges of contempt are set forth against two different defendants, neither one being charged with the same offense as the other, and we object to any further evidence being offered in this case on the ground that two separate defendants are charged in this affidavit for contempt with two separate acts of contempt, not charged jointly with the same act, but charged with separate acts."

It seems unnecessary to cite authorities in support of our contention that the method of procedure in these contempt cases was unprecedented. A contempt proceeding is quasi criminal and surely

a defendant in such a proceeding is entitled to have his case defended without his counsel being handicapped by being compelled to conduct the defense of another defendant at the same time, the other defendant being charged with an entirely different offense.

III.

The third specification or error was

"The Court erred in overruling the objection of the defendants to the introduction in evidence of a document marked "Plaintiffs Exhibit B," being a written order of the Court, which recites the circumstances which took place before the Grand Jury and directs the defendants to appear before the Grand Jury and answer certain questions set forth in said order."

The objection to the admissibility of this order is stated on Page 18. Transcript of Record as follows:

> "We object to the admissibility, if the Court please, on the ground that it was not executed until after the alleged refusal of the defendants to obey it."

The objection was based upon the testimony of the witness Adams, pages 17 and 18, Transcript of Record. After the exhibit was received in evidence, further testimony was obtained from the witness Saxton as to when it was prepared, signed and filed. (Transcript of Record, page 22.)

The affidavity for contempt charges that the

Court "ordered and directed each of said defendants to answer each and all of the above questions shown by said report to have been propounded to each of said defendants before said Grand Jury, a copy of which order is hereto attached, marked Exhibit A, and made a part hereof." Attached to and following the affidavit for contempt set forth on pages 1 and 2 of the Transcript of Record is the copy of the order designated in the affidavit for contempt as "Exhibit A," although the same does not seem to be marked as "Exhibit A," as printed in the record on pages 2 and 3 immediately following the affidavit for contempt. It is plain, however, that this was the order described in the affidavit for contempt, but that the District Attorney or the person preparing the affidavit of which the order was a part simply omitted to mark the latter "Exhibit A."

The defendants then, were charged with contempt in refusing to obey a written order. No other conclusion can be drawn from the affidavit for contempt of which the order is a part. Before the order was admitted in evidence, testimony was introduced on cross examination of the Witness Adams, showing the order to have been executed after the commission of the alleged contempt. This evidence clearly establishes its inadmissibility. No circumstances proved to have occurred after the refusal of Plaintiffs in Error to answer the ques-

tions propounded to them can have any bearing or materiality in the case.

It will be answered that the evidence discloses a verbal order of the Court to the Plaintiffs in Error to answer the questions set forth in the affidavit for contempt. This is true, but unfortunately the defendants were not charged with the violation of any order except the order in writing, a formal order, made after the commission of the alleged offense.

IV.

The fourth specification of error relied upon by the Plaintiffs in Error is, that the Court erred in overruling defendants demurrer to the evidence and denied the defendants' request that they be forthwith discharged.

This specification of error involves the same questions as to the incriminatory character of the questions propounded to Plaintiffs in Error as the involved in the first specification of error.

The demurrer to the evidence also again calls to the attention of the Court, the fact that the written order of the Court, a copy of which is made a part of and attached to the affidavit for contempt, was prepared by District Attorney, Saxton on the day following the commission of the alleged contempt and thereafter signed by the Judge and filed, thus supporting the contention of Plaintiffs in Error that the Court erred in refus-

ing to sustain their demurrer to the evidence. They were charged in the affidavit for contempt with having violated a written order of the Court and no other, and therefore, the conviction cannot stand based on evidence of some other and oral order.

In conclusion, we submit that this case is of much more importance than the circumstances, and the punishment inflicted, seem to indicate. At the time the alleged offense was committed, April 4th, 1916, at Nome, Alaska, navigation was closed. There was no communication with the United States, except by wire. The Plaintiffs in Error were committed to jail and told to stay there until they answered certain questions. They were forced, in order to obtain their liberty, to surrender what they regarded as their constitutional rights, and as the record discloses, eventually appeared before the Grand Jury and answered the questions. No mail leaves Nome, Alaska, after April 4th, until the middle of June. It is essential that the Courts of Alaska, especially in the remote jurisdictions, be clearly informed as to the constitutional rights of witnesses. Otherwise their rights can, and will, be disregarded with impunity by zealous officials.

Respectfully submitted,

GEORGE B. GRIGSBY,
Attorney for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

CHARLES MASON AND A. HANSON, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES. } No. 604.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to review penalties imposed by the District Court of Alaska for the Second Division upon the plaintiffs in error for contempt of court (R. 8).

On April 4, 1916, Mason and Hanson were witnesses before the grand jury engaged in an investigation of a charge of gambling against other persons (R. 1, 15). Mason was duly sworn and voluntarily testified that he was present, and was sitting at a table in the Arctic Billiard Parlor in Nome at the time the persons

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under investigation were arrested (R. 15). He was then asked the following questions (R. 15):

> Was there a game of cards being played on this particular evening at the table at which you were sitting?
>
> Was there a game of cards being played at another table at this time?

Hanson was duly sworn and testified that he was present, sitting at a table in the Arctic Billiard Parlor at the time of the arrest. He was then asked the following questions (R. 15):

> If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing stud poker or pangingi?
>
> If at this same time you saw any one playing a game of cards at the table at which you were sitting?

Hanson refused to answer both questions, claiming his privilege against self-incrimination (R. 19). Mason refused to answer the first question propounded to him on the same ground, but made answer to the second question that he did not know (R. 19).

The grand jury then reported the facts to the court (R. 14, 15). The witnesses Mason and Hanson being present (R. 17, 23, 24), the court, after arguments of counsel and due consideration, ordered the questions to be answered (R. 16, 17). Mason and Hanson immediately repaired to the grand jury room; the questions were again put and the same refusals made, but this time no reason was assigned therefor (R. 20, 24).

On the 5th of April, 1916, the foreman of the grand jury presented to the court the affidavit for contempt (R. 1, 2). On April 6 full trial was had. Both Mason and Hanson were adjudged guilty of contempt, ordered to be confined until such time as they should appear before the grand jury and answer the questions, and also fined $100 each (R. 8). The defendants thereafter answered the questions before the grand jury and an order was made discharging them from custody (R. 7). They bring the case to this court to reverse the judgments of fine.

Four specifications of error are now relied upon. (Brief of plaintiffs in error, pp. 5–7.) Three questions are raised, the principal of which is on the merits: Were the refusals to answer justified under the witnesses' privilege against self-incrimination?

ARGUMENT.

I.

The defendants were not entitled to withhold the testimony on the ground that it might incriminate them.

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *." Constitution, Amendment Five. Subject to this qualification the United States is entitled to the testimony of each of its citizens. The right of the citizen not to incriminate himself is no more sacred than the right of the public not to have impeded the due course of the administration of justice. As the cases have arisen, the line of accommodation between the two principles has been drawn. Both are to be

reasonably applied, so that on the one hand the constitutional safeguard is not infringed and on the other it is not used as a shield behind which persons other than the witness may hide.

By virtue of the substantial character of the privilege it was early settled that not only is the witness protected against the compulsory direct confession but also against the disclosure of any fact which furnishes a "necessary and essential part of a crime." Marshall, C. J., in *In re Willie* (*Burr's trial*), 25 Fed. Cas. No. 14692e, pp. 38, 40. Plaintiffs in error rely upon the rule as then stated by Marshall. (Brief, p. 7.)

But it is only such a fact which may withheld; unless it is "a necessary and essential part of a crime" the duty to testify is controlling. As said by Wigmore, vol. 3, Evidence, section 2261:

> It is obvious * * * that the notion of a fact "tending to criminate" is that of a fact forming, in the phrase of Chief Justice Marshall, "a necessary and essential part of a crime." The assumption is that the means establishing the other parts are already available for the prosecution, and that the claimant's disclosure of the missing link will complete the chain and thus in effect criminate him.

Moreover, the court before whom the privilege is claimed must have reasonable ground to fear danger to the witness from the use of his answer in a subsequent criminal prosecution. The privilege "does not extend to remote possibilities out of the ordinary

course of law." *Heike* v. *United States*, 227 U. S. 131, 144. In *Brown* v. *Walker*, 161 U. S. 591, 599, 600, this court said, quoting with approval the opinion of Lord Chief Justice Cockburn in *Queen* v. *Boyes*, 1 B. & S. 311, 321:

> "To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. * * *
>
> "Further than this * * * we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, not a danger of imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."

See *Hale* v. *Henkel*, 201 U. S. 43, 68. Judge Taft, in *Ex parte Irvine*, 74 Fed. 954, following the rule laid down by Marshall in the *Willie* case, said (p. 960):

> The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises

> to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

It is not enough that the fact sought to be withheld may be relevant in a subsequent prosecution. It must be such as may aid a conviction in some substantial degree. That the witness is A. Hanson, that he was in Nome at the time of the offense, that he was in the billiard parlor, are relevant facts, but not such as may be withheld. In the *Heike* case, *supra*, the immunity statute involved having been construed as substantially coextensive with the constitutional privilege, the question was whether the testimony by Heike that he was the person to whom the subpœnas were addressed and also the secretary of the American Sugar Refining Company, was privi-

leged. Though the crime charged against Heike was fraud committed as such secretary, this court held against the claim, saying (227 U. S. 142):

> To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Evidence, §2261.

The *Heike* case also shows that a fact which is well known, so that the Government would not need or be likely to use the witness's admission, may not be withheld, for any resulting self-incrimination is unsubstantial. Heike was convicted of a conspiracy to defraud the United States, and the overt acts charged were his signatures to four checks. Yet it was held that Heike's testimony identifying his signature to other checks was not privileged. The Circuit Court of Appeals said (192 Fed. 83, 89):

> The four overt acts charged under the sixth count related to his signature of four checks; but the government did not seek to use the Segal-Kissel checks to make proof of his signature to the others. It is conceded that his admitted handwriting on the Segal checks could not even be used as standards of comparison to establish the signature to ones referred to in the sixth count (*Hickory* v. *U. S.*, 151 U. S. 308), and no effort was made to do so. The suggestion that comparison of the signatures on the four checks of the sixth count with the four signatures on the Segal checks would have "enabled the investigator

> to determine that they were made by the same man and were in one and the same handwriting" seems to us overstrained. As secretary for many years of both companies, signatures concededly Heike's were scattered broadcast by thousands through the community. Indeed, no comparison was needed. The identity of name and office was quite sufficient for the investigator. Proof of the genuineness of the signatures of the sixth count was easily to be found without any reference to the testimony before the grand juries.

This court said, in affirming the point thus treated in the opinion of the Circuit Court of Appeals (227 U. S. 143):

> So the admissions of his signature to certain checks, although it furnished a possible standard of the petitioner's handwriting if there had been any dispute about it, which there was not, in the circumstances of this case at least had neither connection nor criminating effect. When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law.

It is plain that the rule stated by Marshall in the trial of Aaron Burr, relied upon by plaintiffs in error in this case, expresses at once the extent and the limits of the witness's privilege. The facts of the *Willie* case, *supra*, further show what Marshall meant by "a necessary and essential part of a crime." Willie was secretary to Burr. A cipher letter was placed

before him and the question asked, "Do you understand the contents of that paper?" The objection was made that to have knowledge of treason and not to disclose it constitutes misprision of treason and the witness was entitled to claim his privilege. After argument and due consideration the Chief Justice said (25 Fed. Cas. 40):

> It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer will disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction.

Plain though it is that as a relevant fact in a subsequent prosecution for misprision of treason, present knowledge might be used from which to draw the inference of past knowledge, nevertheless Willie was compelled to answer because his present understanding was not a necessary link in a reasonably foreseeable chain of evidence to convict him.

As to the facts of this case: Under all the circumstances at the time the trial court was called upon to judge, was there any substantial danger reasonably to be foreseen that the answers were capable of being used as a necessary and essential link in a chain of evidence to convict?

As to Hanson: Fully aware of his rights, he voluntarily testified that he was in the billiard parlor at

the time of arrest; and that he was sitting at a table (R. 15). He was then asked, and refused to answer, if he saw anyone playing stud poker or pangingi. We deal first with this question alone.

In Alaska playing at poker is prohibited.[1] Section 2032, Compiled Laws of Alaska, 1913. Observing others to play is not prohibited. Nor is there any legislative prohibition against frequenting gambling houses.

Suppose Hanson answered that he did see someone playing stud poker. This is no proof of participation. It is not close enough under ordinary circumstances to be even a dangerous admission. Hanson's mere presence could not reasonably be said to be a dangerous fact, because knowing his rights he had already voluntarily testified that he was sitting at a table at the time of arrest (R. 15).

Plaintiffs in error, however, suppose a case in which the Government has testimony that everyone in the room was participating in whatever game was going on; hence the admission that the game was stud poker or pangingi would furnish a necessary and essential link for conviction. In their brief they

[1] SEC. 2032. That each and every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor or employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenet, rondo, vingt-un, twenty-one, poker, draw poker, brag, bluff, thaw, craps, or any banking or other game played with cards, dice, or any other device, whether the same shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid: *Provided*, That such person so convicted shall be imprisoned one day for every two dollars of such fine and costs: *And provided further*, That such imprisonment shall not exceed one year.

assert that this supposititious case actually represents the truth. We have no knowledge as to the actual facts in this case. The record discloses no such extraordinary situation. Plaintiffs in error admit that the trial judge at the time he was called upon to make the order did not know it. (Brief, p. 16.) In determining whether the trial court's order was correct we must view the case as the trial court was called upon to do at the time. It is submitted that such a case as is now supposed by plaintiffs in error is so far out of the ordinary course of human events that there was no reasonable ground to apprehend danger in requiring the witnesses to answer.

Support for this view is found in the decided cases. Questions substantially the same as those asked this witness have been asked in previous grand jury investigations, and the courts have held that the privilege of silence does not obtain. In *Ward* v. *State*, 2 Missouri 120, Ward, called before the grand jury, testified that he knew of persons having bet at a faro table in the county within the last twelve months. He was then asked to tell what person or persons other than himself had played. He declined to answer, pleading his privilege against self-incrimination. In holding him guilty of contempt, the Supreme Court of Missouri said (pp. 122, 123):

> The answer of the witness is (supposing him to be A) that if I tell that B, C, and D played, it will be either full or partial evidence that I played. This is the whole argument of the case. An argument which I think is wholly untenable in law and reason. * * *

I understand the rule laid down by Chief Justice Marshall, in Burr's trial, 245, to be the true rule of law. It is this, that it is the province of the court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. In such case the witness must himself judge what his answer will be, and if he say on his oath he cannot answer without accusing himself, he cannot be compelled to answer.

Both parties rely on this rule. Apply the rule to the case before the court: The witness says he cannot answer without accusing himself of crime. The question is, Who did you see betting at faro except yourself? It is believed that a direct answer in the negative to this would be, I saw no one bet at faro. This answer, I think, all will allow, does not accuse him; but suppose his answer must be that he saw B bet at faro, can it not be true that though B bet, yet he, the witness, did not? Does the mere fact that one man saw another commit crime prove in law or reason that he who saw the crime committed was a participator? The only irresistible fact that is contained in it is that he who saw the fact must have been in such position, with respect to the actors, that he could see or know the thing he swears to. * * *

The *Ward* case was approved in *Ex parte Buskett*, 106 Mo. 602, 606, 609. In that case the propriety of similar questions was in issue, an immunity statute having been enacted. The court considered the extent of the privilege against self-incrimination in the absence of statutory protection and said (p. 608):

> Suppose he had answered that he had seen A and B gambling with cards. What fact would have been disclosed that could have "formed a link in a chain of evidence" against himself? To look on at others gaming is not a criminal offense subjecting the observer to prosecution.
>
> It is insisted, however, and this is the main ground of contention, that facts might be disclosed which would afford facilities for fastening the guilt upon the witness. Thus it is contended, if witness should have answered that he had seen A and B gaming then they could be called as witnesses to prove that petitioner was at the same time engaged in gaming. It will be seen that this illustration assumes a case outside the protection of the constitution itself as most liberally interpreted. The court in the case of *People* v. *Hackley*, *supra*, speaking on this possibility, says: "But neither the law nor the constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or, at least, capable of proof, though his account of the transactions should never be used

as evidence, it is the misfortune of his condition, and not any want of humanity in the law."

Referring again to the opinion of McGirk, C. J., in case of *Ward* v. *State*, *supra*, his concluding observations meet directly the point here urged: "But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact whether he bet; and, if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offenses and offenders a secret, lest the offenders should in their turn give evidence against him?

In *Ex parte Lindo*, Fed. Cas. No. 8364, the witness before the grand jury was asked, "Did you within the last three months see R. L. play at any public gaming table within the county of Alexandria?" Objection was made that an answer would show that the witness was present and it might induce R. L. to prosecute. The court held the witness must answer.

The *Ward* case is approved by Wigmore. Section 2261. After stating the rule of law announced by Marshall and condemning its misapplication, Wigmore says (p. 3121):

> The issue was squarely presented in rulings upon a claim of privilege resisting such an interrogatory as this: "Who, other than your-

> self, is known to you to have participated in a crime?" or "to have been present at its commission?" The following opinion faces the issue firmly:

Wigmore then quotes from the opinion in *Ward* v. *State, supra.*

As things ordinarily go, therefore, the trial court was justified in apprehending no substantial danger to the witness Hanson from an answer. Every gambling house has its proportion of nonparticipants who simply look on. That Hanson's answer that he had seen some one playing poker would form the missing link in a chain of evidence to convict him could not reasonably be apprehended. So far as appeared, the refusal to answer meant either a shielding of friends from prosecution or a fear not that his answer would be used at a trial, but that his friends might retaliate. The privilege against self-incrimination was not designed for such use. The grand jury's investigation was halted by reason of the witnesses' refusal. In cases of contempt the lower court has room for the reasonable play of discretion. It is submitted that the discretion was reasonably exercised as to the first question put to Hanson.

If there was no justification for refusing to answer the first question, the sentence for contempt should be affirmed. That he might have refused to answer some other question makes his contempt of court none the less. *Hale* v. *Henkel, supra,* is authority in point. Hale was summoned to appear to give testimony before the grand jury, and also under a *subpœna duces tecum* to produce certain writings.

Refusing in both instances, he was committed for contempt. This court held that the *subpœna duces tecum* was too broad and invalid, but did not disturb the commitment because Hale had no excuse for his refusal to answer the questions (201 U. S. 77).

As to the second question which was asked Hanson: "If at the same time you saw anyone playing a game of cards at the table at which you were sitting?" The considerations already presented show that this question also should have been answered. It is no crime to watch a game of cards from afar or very nearby. Observers frequently sit at tables where others are gambling without themselves participating. This question, moreover, relates to simply playing cards, without the element of gambling.

As to Mason: No different questions are involved.

Persuasive on the issue as to whether or not the trial court was justified in not apprehending any substantial danger to the witnesses is the fact that after the sentence for contempt they returned to the grand jury and made the answers (R. 7).

Moreover, plaintiffs in error waived their privilege of silence, assuming *arguendo* that they had any. They voluntarily testified that they were present in the billiard parlor at the time of arrest, seated at a table (R. 15). Counsel asserts that this statement was criminatory and privileged (Brief, p. 12). On counsel's own theory, the question as to what they saw there, relating to part of the same matter already testified to, should have been answered.

See *Powers* v. *United States*, 223 U. S. 303, 314, citing *Brown* v. *Walker*, 161 U. S. 591, 597.

II.

There was no error in the introduction in evidence of plaintiff's Exhibit A.

The substance of the second specification of error upon which plantiffs in error rely is that the two defendants were being tried for two separate acts of contempt in the same proceeding. The practice in contempt proceedings, however, does not follow the nicety of ordinary criminal cases. The transactions were so related that the witnesses testifying to the one contempt testified in the next breath to the other. Time and expense were saved by the single proceeding. No actual prejudice to either defendant or embarrassment to counsel is suggested, and it was therefore proper for the court to consider both contempts at the same time. Moreover, the error now relied upon relates to the introduction of evidence after the trial had begun (R. 15).

III.

There was no error in the introduction in evidence of plaintiff's Exhibit B.

The date of the contempt alleged in the affidavit is April 4, 1916 (R. 2). Plaintiff's Exhibit B was the record of the order upon the defendants to answer. The objection to its admission in evidence was that it was, as alleged, not "executed" until after the refusal of defendants to obey (R. 18). The objection is based upon oral testimony that the record was not

written up and signed by the judge until April 5, 1916 (R. 17, 18, 22).

The exhibit bears on its face the date April 4, 1916 (R. 16). A court record cannot be collaterally impeached by parol. As said by Freeman on Judgments, vol. 1, 4th ed., sec. 76: "The verity of a record applies to its date, and therefore evidence is not admissible to show that the date of a judgment as it appears in the judgment book and docket is incorrect," citing *Ferguson* v. *Kumler*, 25 Minn. 183, 187.

Even assuming that its recitals might be contradicted by oral evidence, it was not error to admit the record in evidence. The affidavit of contempt, reasonably construed, complains of the refusal of the defendants to obey the order made on April 4, 1916, "the above-named defendants being present in person" at the time (R. 2). This verbal order was valid and operative prior to being written and entered of record. The evidence showed that the order of April 4, 1916, was made while defendants were in court (R. 17), and its violation is not denied. The objection is without merit.

The fourth specification of error relied upon by the plaintiffs in error raises no new questions.

CONCLUSION.

The sentences below should be affirmed.

JOHN W. DAVIS,
Solicitor General.

ROBERT SZOLD,
Attorney.

APRIL, 1917.

MASON ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

No. 604. Submitted April 11, 1917.—Decided June 4, 1917.

The Fifth Amendment does not relieve a witness from answering merely on his own declaration or judgment that an answer might incriminate him; whether he must answer is determinable by the trial court in the exercise of its sound discretion; and unless there is reasonable ground, as distinct from a remote or speculative possibility, to apprehend that a direct answer may prove dangerous to the witness, his answer should be compelled.

In the absence of manifest error, the ruling of a trial judge upon a witness' objection that an answer may incriminate him, will not be reversed by this court.

Affirmed.

THE case is stated in the opinion.

Mr. George B. Grigsby for plaintiffs in error.

The Solicitor General and *Mr. Robert Szold* for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiffs in error were separately called to testify before a Grand Jury at Nome, Alaska, engaged in investigating a charge of gambling against six other men. Both were duly sworn. After stating that he was sitting at a table in the Arctic Billiard Parlors when these men were there arrested, Mason refused to answer two questions, claiming so to do might tend to incriminate him. (1) "Was there a game of cards being played on this particular evening at the table at which you were sitting?" (2) "Was there a game of cards being played at another table at this time?" Having said that at the specified time and place he, also, was sitting at a table, Hanson made the same claim and refused to answer two questions. (1) "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing 'stud poker' or 'pangingi'?" (2) "If at this same time you saw any one playing a game of cards at the table at which you were sitting?"

The foreman of the Grand Jury promptly reported the foregoing facts and the judge at once heard the recalcitrant witnesses; but as the record contains no detailed statement of what then occurred we cannot know the exact circumstances. The court, being of opinion "that each and all of said questions are proper and that the answers thereto would not tend to incriminate the witnesses," directed them to return before the Grand Jury and reply. Appearing there, Mason again refused to answer the first question propounded to him, but, half

yielding to frustration, said in response to the second, "I don't know." Hanson refused to answer either question.

A second report was presented by the foreman; the witnesses were once more brought into court; and after hearing evidence adduced by both sides and arguments of counsel they were adjudged in contempt. It was further ordered "that they each be fined in the sum of one hundred dollars, and that they each be imprisoned until they comply with the orders of the court by answering the questions." Immediately following this order they made answers, but these are not set out in the record. The fines are unpaid; and we are asked to reverse the trial court's action in undertaking to impose them because it conflicts with the inhibition of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself."

During the trial of Aaron Burr, *In re Willie*, 25 Fed. Cas. No. 14,692e, pp. 38, 39, the witness was required to answer notwithstanding his refusal upon the ground that he might thereby incriminate himself. Chief Justice Marshall announced the applicable doctrine as follows: "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the

negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be."

The constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike* v. *United States*, 227 U. S. 131, 144; *Brown* v. *Walker*, 161 U. S. 591, 599, 600.

In *The Queen* v. *Boyes* (1861), 1 B. & S. 311, 329, 330, Cockburn, C. J., said:

"It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. . . . To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: . . . A question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a Judge is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril."

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with

reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

The statement of the law in *The Queen* v. *Boyes* was expressly approved by all the judges in *Ex parte Reynolds* (1882), 20 Ch. Div. 294. Similar announcements of it may be found in *Ex parte Irvine*, 74 Fed. Rep. 954, 960; *Ward* v. *State*, 2 Missouri, 120, 122; *Ex parte Buskett*, 106 Missouri, 602, 608.

The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

In the present case the witnesses certainly were not relieved from answering merely because they declared

that so to do might incriminate them. The wisdom of the rule in this regard is well illustrated by the enforced answer, "I don't know," given by Mason to the second question, after he had refused to reply under a claim of constitutional privilege.

No suggestion is made that it is criminal in Alaska to sit at a table where cards are being played or to join in such game unless played for something of value. The relevant statutory provision is § 2032, Compiled Laws of Alaska, 1913, copied in the margin.[1]

The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded and, in the circumstances disclosed, we cannot say he reached an erroneous conclusion.

Separate errors are also assigned to the trial court's action in permitting counsel to introduce two documents in evidence; but we think the points are without substantial merit.

The judgment under review is

Affirmed.

[1] "Sec. 2032. That each and every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor or employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenet, rondo, vingt-un, twenty-one, poker, draw poker, brag, bluff, thaw, craps, or any banking or other game played with cards, dice, or any other device, whether the same shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid: *Provided*, That such person so convicted shall be imprisoned one day for every two dollars of such fine and costs: *And provided further*, That such imprisonment shall not exceed one year."